Denver Law Review

Volume 66 | Issue 2 Article 7

February 2021

Fundamentalist Christians, the Public Schools and the Religion Clauses

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FUNDAMENTALIST CHRISTIANS, THE PUBLIC SCHOOLS AND THE RELIGION CLAUSES

INTRODUCTION

Public education in the United States is under concerted attack by Fundamentalist Christians. The attacks range from attempts to remove books from public school libraries and classrooms, to opposition to the nature of the values and skills taught in the public schools, and even to charges of witchcraft being levelled at individual teachers.[1] There is a general perception among religious leaders,[2] educators,[3] and public interest groups,[4] that all references to Judeo-Christian religion have been removed from the curriculum of the public schools. An anecdotal illustration of this sort of omission is the allegation that history textbooks omit the quest for religious freedom from the list of reasons that the Pilgrims came to the New World.[5]

A federal case, initially brought in the Eastern District Court of Tennessee, *Mozert v. Hawkins County Public Schools*,[6] raises first amend-

1. *See, e.g.*, Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986); Board of Educ. v. Pico, 457 U.S. 853 (1982); EAGLE FORUM, THE STUDENT'S BILL OF RIGHTS (n.d.) [hereinafter STUDENT'S BILL]; G. Asakawa, *Closing the Book on Bennett*, 10 Westword 13 (1987); Hechinger, *What is Role for Education Department?*, N.Y. Times, Apr. 29, 1986; LaHaye, *Whose Ethics in the Government Schools?*, 23 KAPPA DELTA PI RECORD 72 (1987) [hereinafter LaHaye]; Jones, *Fundamentalists Enliven School Board Race*, Rocky Mountain News, July 20, 1986, at 22; McGraw, *Secular Humanism and the Schools*, The Heritage Foundation (1976); McGraw, *Teacher's Practices Based on Occult, Educator Says*, Denver Post, Mar. 20, 1987, at 2B; Tinsley, *Parents Found Guilty of Slandering Teacher*, Rocky Mountain News, Mar. 21, 1987, at 21.

2. Interview with Reverend Gilbert Horn, National Council of Churches (Apr. 10, 1987) [hereinafter Horn]; Interview with Ann Edelman, Anti-Defamation League of B'nai B'rith (Apr. 10, 1987).

3. P. Vitz, RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS (National Institute of Education Study No. 6-84-0012, Project No. 2-0099, September, 1985) [hereinafter NIE Study]; ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, RELIGION IN THE CURRICULUM (1987) [hereinafter ASCD REPORT]; Interview with Gail Mertz, Boulder County Safeguard (May 15,1987) [hereinafter Mertz]. Boulder County Safeguard is a branch of county government attached to the Boulder Valley School District which presents law-related programs to both students and teachers. Its employees are educators, not attorneys. Interview with Bruce Koranski, Staff Associate at the Center for Teaching International Relations, University of Denver (May 5, 1987) [hereinafter Koranski]. Interview with Barbara Miller, Ginnie Jones and Jackie Johnson, Social Science Consortium, University of Colorado (April 27, 1987) [hereinafter Miller].

4. PEOPLE FOR THE AMERICAN WAY, LOOKING AT HISTORY (1986) [hereinafter PAW STUDY]; LaHaye, *supra* note 1. People for the American Way ("PAW") is a special interest group opposed to conservative Christian challenges to public education.

5. Horn, *supra* note 2; Miller, *supra* note 3.

6. There are six opinions with the caption *Mozert v. Hawkins County Public Schools*. In order to avoid confusion, each opinion will be consistently referred to in the following short form: The first memorandum opinion is cited at 579 F. Supp. 1051 (E.D. Tenn. 1984) ("*Memorandum Opinion I*"); the second memorandum opinion is cited at 583 F. Supp. 201 (E.D. Tenn. 1984) ("*Memorandum Opinion II*"); the first Sixth Circuit decision is cited at 765 F.2d 75 (6th Cir. 1985) ("*Circuit Six I*"); the case on remand is cited at 647 F. Supp. 1194 (E.D. Tenn. 1986) ("*Remand Decision*"); and the second opinion of the Sixth Circuit

ment issues concerning establishment and free exercise of religion with regard to education of Fundamentalist Christian children in public schools.[7] In *Mozert,* the objections raised by the plaintiffs, Fundamentalist Christian parents and their children, highlight the concerns that Fundamentalist Christians have with the teaching of certain concepts, skills, and values as in the public schools of this country. These concerns are rooted in the sincere religious beliefs of the Fundamentalist Christians. If the public school system attempts to accommodate their demands and raise free exercise questions for reform, it must be aware of and avoid the possibility of violating the establishment clause by "favoring" religion.[8]

In our increasingly diverse society, we are faced with the question of whether there can be an adequate accommodation of the values-orientation held by every group with children enrolled in the public schools. Many educators believe that the public school system in this country teaches only such values as the need for timeliness, "good" work habits, and social cooperation, while at the same time engaging in a process of "values clarification"[9] which enables children to practice ethical problem-solving by applying values learned at home, in church, mosque, or synagogue to hypothetical problems raised in classroom discussions regarding readings from textbooks, newspapers, and magazines.[10] On the other hand, many professional educators believe that other values are taught in the schools and that many of these values are inappropriate.[11] Members of Fundamentalist Christian groups[12] and the Reagan Administration's Department of Education[13] believe that values education

Court of Appeals is cited at 827 F.2d 1058 (6th Cir. 1987) ("*Circuit Six II*"). *Certiorari* was denied by the United States Supreme Court at 108 S. Ct. 1029 (1988).

7. The religion clauses of the first amendment mandate: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

8. Supreme Court precedent suggests that government in the United States, whether federal, state or local, may neither favor nor oppose religion or non-religion. Governmental attempts to accommodate religious citizens' demands based on the Free Exercise Clause often raise questions of legality under the Establishment Clause. *See, e.g.*, Tushnet, THE CONSTITUTION OF RELIGION, 18 CONN. L. REV. 701 (1986); *The Tension Between the Free Exercise Clause and the Establishment Clause of the First Amendment*, 47 OHIO ST. L.J. 289 (1986) [hereinafter *Tension*]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812 (2d ed. 1978) [hereinafter TRIBE].

9. Values clarification is supposed to be a neutral means of helping students understand their own values. Miller, *supra* note 3. For a full discussion of the methodology and theory of values clarification see *infra* notes 185-191 and accompanying text.

10. Miller, *supra* note 3.

11. *See, e.g.*, THE HIDDEN CURRICULUM AND MORAL EDUCATION (Giroux & Purpel ed. 1983) [hereinafter HIDDEN CURRICULUM]. *See also infra* notes 186-193 and accompanying text.

12. *See* LaHaye, *supra* note 1; STUDENT'S BILL, *supra* note 1.

13. *See* CUNNINGHAM, BLOWING THE WHISTLE ON "GLOBAL EDUCATION" (n.d.) (report prepared for Thomas G. Tancredo, Regional Representative, Region VIII, U.S. Dept. of Education) [hereinafter CUNNINGHAM]; Address by G.L. Bauer, Secretary of the United States Deptartment of Education, *Association of American Publishers* Annual Meeting (Jan. 1986); Finn, *Decentralize, Deregulate, Empower*, POLICY REVIEW 58 (Summer 1986). Mr Finn was Assistant Secretary for Research and Improvement, United States Department of Education, at the time he wrote this article. Mr. Finn published a number of articles touting the voucher system for funding education in the United States. This system would have

should reflect more traditional "Judeo-Christian" viewpoints. One Fundamentalist Christian special-interest group, Concerned Women for America (CWA), which represents the plaintiffs in the *Mozert* case, has stated its goal:

> Concerned Women for America hopes to educate Americans on the pernicious philosophy and effects of Secular Humanism. We would like to see Secular Humanism thrown out of the government schools and biblical morality restored. Meanwhile, CWA will continue to defend the rights of parents and children to opt out of classes offensive to their beliefs. It is clear that secular humanism has only resulted in poor academic standards, a breakdown of decency, and total ignorance about the Christian roots of America.[14]

This is not the first struggle over the religious content of curriculum in the public schools. Such conflicts have occurred from the very beginnings of public education in the eighteenth century[15] and from time to time since then.[16] Struggles over the public school curriculum are seen by some as a process of adapting the fundamental tenets of an "American Civil Religion" to demands of religious groups for accommodation of their beliefs.[17]

The objective of this note is to examine the nature of the values taught, the manner in which they are taught, and who shall determine which values will be taught in the public school systems of the United States. The *Mozert* case will serve as a focus for these issues. Furthermore, this note will trace the history of education and the values taught in the public schools from colonial days, through the nineteenth century which saw the inception of universal free public education, into the present time. Lastly, this note will consider whether the Fundamentalist Christian challenge is well-founded in light of the religion clauses of the first amendment and Supreme Court precedent regarding both the place of religion in the public schools and the relative roles of parents and educators in determining the curriculum presented by the public schools of this nation.

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state and local governments issue vouchers to all parents with children of school age. The vouchers would be used to finance the education of children in schools of their choice as well as their parent's choice, whether those schools would be "public," private or parochial. *See* Rosen, *Voucher System Would Raise Quality in Our Public Schools*, Denver Post, June 20, 1984; D. Lee, *The Uncertain Prospects for Educational Vouchers*, THE INTERCOLLEGIATE REVIEW 29 (Spring 1986); J. McLaughry, *Who Says Vouchers*, REASON 24 (January, 1984); S. Taichi, *Supply-Side Competition for the School System*, XI JAPAN ECHO 38 (1984); M. Lieberman, MARKET SOLUTIONS TO THE EDUCATION CRISIS (1986) (Policy Analysis No. 2, CATO Institute, Washington, D.C.). At least one Denver-area educator believes that the conservative Christian challenges to the schools are brought with the goal of arousing enough dissatisfaction with the public schools that the voucher system would be implemented.

14. LaHaye, *supra* note 1, at 74-75.

15. L. WRIGHT, CULTURE ON THE MOVING FRONTIER 60 (1955) [hereinafter WRIGHT].

16. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925) *Pierce* involved the legality of private education in Oregon, both secular and sectarian, in the face of a law providing for compulsory attendance in public schools. The Court held that the state's interest in educating its citizens could be fulfilled by such private education.

17. *See infra* notes 168-185 and accompanying text.

Tennessee's Educational Program

Determined to provide better education for its resident children, Tennessee adopted a Better Schools Program in 1983. Tennessee has committed to significant expenditure of state funds to implement this program and for public education generally.[18] An essential part of the Better Schools Program is the Basic Skills First Program, which emphasizes certain skills in reading and mathematics which are to be taught sequentially in an integrated curriculum from kindergarten through eighth grade. The state of Tennessee considers the reading curriculum to be the heart of both the Basic Skills First Program and elementary education. Specific curriculum objectives are identified in this program and all public schools in Tennessee are required by law to adopt it and to achieve its objectives.[19]

In *Mozert*,[20] the defendants, the Hawkins County Public Schools and school officials, assert that critical reading is an important part of any reading program.[21] It helps to develop higher order cognitive skills, enabling students to evaluate material they have read, to contrast ideas presented, and to understand complex characters portrayed in reading materials. Critical reading leads to critical thinking, a skill considered by Tennessee to be essential to good citizenship. Tennessee "schools seek to teach students to be autonomous individuals, who can make their own judgments about moral questions."[22] In order to develop autonomous students, Tennessee, in its reading program, seeks to expose students to "real life," morally ambiguous situations in which characters act both acceptably and unacceptably in light of general societal standards. By discussing the characters' actions, students can learn vicariously the results of inappropriate as well as appropriate values decisions.

Another goal of Tennessee's educational program is to teach appreciation of the value of tolerance, an essential part of education in a pluralistic society. To learn tolerance, defendants argue, it is necessary to expose students to a broad range of religious and social beliefs. Controversial contemporary topics, such as feminism and various personal and family problems, are presented in order to help prepare students for

18. *See* Brief of Appellants, Mozert v. Hawkins County Pub. Schools, 827 F.2d 1058 (6th Cir. 1987) (Nos. 86-6144, 86-6179 and 86-6180) [hereinafter Brief for Appellant Schools]. The Brief for Appellant Schools sets out the goals of Tennessee's public education program and the means it has chosen to accomplish them. *Id.* 1-8. The brief asserts that Tennessee devotes more than half of its annual statewide expenditures to education. *Id.* at 2.

19. Tenn. Admin. Reg. 0520-6-1, 0520-6-4 (1987).

20. Specifically, the plaintiffs are the Fundamentalist Christian parents and their children whose attorneys subsequently drafted the "Brief of Appellees." The defendants, whose attorneys subsequently drafted the "Brief of Appellants," are the Hawkins County Public Schools and school officials, including the Commissioner of Education of the State of Tennessee.

21. Brief for Appellant Schools, *supra* note 18, at 3.

22. *Id.* at 4.

dealing with similar problems, as well as public controversies, which may at some time have an impact on their own lives.

Another educational technique claimed by defendants to be essential in implementing Tennessee's educational reform involves engaging students in subject matter by presenting and discussing controversial issues which are likely to pique their interest. Tennessee schools develop students' imaginations through presentation of magic in classical children's stories and through role-playing.

These important skills and values (i.e., critical thinking and tolerance) are taught in an integrated curriculum including courses in science, social studies, history and literature, as well as in reading class. The basal reader is considered to be a necessary part of the schools' teaching tools because it helps to determine what skills are taught and presents those skills in a sequence which facilitates learning.[23] Tennessee's overall goal in providing for a curriculum emphasizing development of the skills and values discussed above is the development of good citizens who can actively participate in modern society.

Tennessee requires all public schools to use textbooks selected from a state-approved list.[24] In 1982, the State Textbook Commission, after receiving advice from public school teachers, state educational consultants and the general public, developed a list of books approved for use in developmental reading classes.[25] The Holt, Rinehart and Winston basal reading series (the "Holt series") was selected from the state-approved list by a committee of Hawkins County reading teachers in 1983, partly because it contains award winning literature which the teachers believed would stimulate students' interest.

The goals, concepts, skills and values of Tennessee's public school curriculum and the methods chosen to implement them are consistent with current educational theories and practices.[26] Plaintiffs, who are Fundamentalist Christians, challenged the authority of Tennessee to mandate this curriculum because it allegedly violated their right to free exercise of their religious beliefs.

Lines of Conflict Drawn

In late August, 1983, less than a month after the Holt series had been introduced into the Hawkins County public schools, Rebecca Frost, a sixth grader, asked her mother, Vicki Frost, for help with her reading homework. The story Rebecca was reading dealt with mental telepathy; Mrs. Frost had religious objections to mental telepathy.[27]

23. *Id.* at 7. Basal reader series include not only a set of textbooks developed for use in the elementary and middle grades but supplementary materials often introduced by teachers. *Id.* at 7, n.36.

24. TENN. CODE ANN. § 49-6-2206 (1983).

25. Brief for Appellant Schools, *supra* note 18, at 8.

26. *See infra* notes 94-157 and accompanying text.

27. Brief for Appellee Parents at 3, Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987) (Nos. 86-6144, 86-6179 and 86-6180) [hereinafter Brief for Appellee Parents].

Mrs. Frost examined the Holt series further and then communicated her concern about the readers to Hawkins County school officials and other similarly minded parents.[28] The parents' concern focused on concepts, values, and teaching methods objectionable to them due to their religious beliefs. Plaintiff parents and their children belong to different churches and their beliefs are personal, not derived from the stated doctrine of any of their congregations. The appellate brief submitted on behalf of the parents and their children sets out their objections.[29] In September, 1983, a group of Hawkins County residents, including most of the plaintiffs, formed an organization which lobbied at regularly scheduled school board meetings, objecting to the use of the Holt series and seeking removal of those textbooks from the schools.[30] During this time, plaintiffs also requested that alternative reading programs be provided by the Hawkins County schools for their children.[31] Such alternative programs were established at one middle school and two elementary schools.[32]

At a meeting held on November 10, 1983, the Hawkins County School Board unanimously decided, without discussion according to plaintiffs, to require teachers to use only textbooks adopted by the Board of Education as regular classroom textbooks.[33] Plaintiffs implicitly characterize the school board's decision as uninformed and closeminded, citing statements by various members of the school board and local "mainstream" clerics that the school board had evaluated the Holt series in light of their own religious beliefs and had found no personal objections to it. Plaintiffs further alleged that only one school board member *may* have spoken with *any* school official before voting to cancel the alternative reading programs. The appellate brief filed on behalf of the parents asserted that the school board rejected every proposal made for an alternative reading program and quotes testimony from the trial on remand:

The board should have taken a harder line against [the par-

28. *Id.*; Brief for Appellant Schools, *supra* note 18, at 10.

29. Brief for Appellee Parents, *supra* note 27, at 10-24. *See infra* notes 41-49 and accompanying text for further discussion of the parents' objections to the Holt series. The objections include a familiar litany of problems that Fundamentalist or Conservative Christians have with concepts and values taught in the public schools of this country. In the ever increasingly diverse society in which we live, the question is whether there can be an adequate accommodation of the values orientation of every group with children in the schools. Many educators believe that the public school system in this country teaches only neutral values while at the same time engaging in a process of "values clarification" to reinforce values learned at home and in church. For a further discussion of these ideas see *infra* notes 170-77 and accompanying text.

30. *Remand Decision*, 647 F. Supp. 1194, 1196 (E.D. Tenn. 1986).

31. *Id. See* Brief for Appellant Schools, *supra* note 18, at 17; Brief for Appellee Parents, *supra* note 27, at 3.

32. *Remand Decision*, 647 F. Supp. at 1196; Brief for Appellant Schools, *supra* note 18, at 17-18; Brief for Appellee Parents, *supra* note 27, at 3-4. Eight or nine children participated in these alternative programs which lasted approximately six weeks.

33. *Remand Decision*, 647 F. Supp. at 1196; Brief for Appellant Schools, *supra* note 18, at 18; Brief for Appellee Parents, *supra* note 27, at 5. Appellants merely state that the board rejected the alternative reading programs without addressing whether there had been discussion of the topic at the meeting.

> ents]. If we had taken a hard nosed attitude to begin with, I mean a real hard nosed attitude, it wouldn't have gone this far. The case would have ended up in federal court, but the board wouldn't have had to listen to these people for four or five meetings. I listened patiently, I thought all they wanted was to be heard. Everything they did had a purpose, they provoked you to do what they wanted and then they cry wolf. If you give them an inch, they want a mile.[34]

Plaintiffs also cite the deposition of the Superintendent of the Hawkins County Public Schools in 1983 as stating that "forcing the children to read material that violated their religious beliefs would build character and develop self-discipline."[35] This same Superintendent's beliefs about the importance of the Holt series in the educational process is quoted in the opinion of the Sixth Circuit Court of Appeals which reversed and remanded the District Court's holding.[36]

The schools complied with the school board's order, informing the students and their parents that alternative reading programs would no longer be provided and that the students would be required to attend the regular reading program and use the Holt series books.[37] Seven middle school students refused to participate in the regular reading program on religious grounds and were initially suspended for three days.[38] Later, these same students were suspended for ten more days for the same reasons. Two of these students were suspended a third time for an additional ten days.[39] After the suspensions, and despite the school board's resolution, two students continued in alternative reading programs, one continuing into early 1984 and the other for the remainder of the school year.[40]

The plaintiffs' first appellate brief asserted that local school officials attempted to stir up sentiment against the families objecting to the Holt series. At a PTA meeting, held at Church Hill Elementary School on December 5, 1983, an announcement was handed out. It read in part:

> As principal of your school and a mother, I now feel that we must stand for your child's rights. It is not appropriate for a few local people controlled by outside sources to try to impose their beliefs on all, and be allowed to disrupt the education of our boys and girls in Church Hill.[41]

Other allegations regarding school officials creating opposition to the plaintiff parents are raised in the parents' appellate brief. These allegations included the fact that the superintendent of the school board and a teacher in a public school addressed a PTA meeting about the textbook

34. Brief for Appellee Parents, *supra* note 27, at 8 (quoting the testimony given by Harold Silver, Chairman of the Hawkins County School Board, during the trial on remand).

35. *Id.* (quoting the deposition of Bill Snodgrass).

36. *Circuit Six I*, 765 F.2d 75,76 (6th Cir. 1985).

37. *Remand Decision*, 647 F. Supp. at 1196.

38. *Id.*

39. Brief for Appellee Parents, *supra* note 27, at 7.

40. *Id.* at 9-10; Brief for Appellant Schools, *supra* note 18, at 18.

41. Brief for Appellee Parents, *supra* note 27, at 10.

selection process. Further allegations stated that a juvenile court judge helped to form a group called "CARE," which opposed parents who objected to the textbooks. The judge also allegedly threatened to arrest children who refused to use the Holt series. Finally, the parents alleged that the author of the announcement quoted above and another public school principal in the county had written letters, which incorporated materials supplied by People for the American Way, to the editor of a local newspaper.

Discussion

It appears from the allegations in the briefs filed in this litigation that both parties started with the good intention of asserting their beliefs about the proper goals and procedures for educating the children of Hawkins County. However, in the heat of highly emotional debate, both sides seem to have lost their objectivity and to have acted questionably. The end result was a power struggle for control of the public schools of Hawkins County which was carried into the court system because neither side could compromise after their positions polarized and hardened.

THE PARENTS' RELIGIOUS OBJECTIONS TO THE HOLT SERIES

Vicki Frost reviewed the Holt series and produced a 212 page document setting out her objections to it. In the brief of the appellees, the Fundamentalist Christian parents and their children, these objections were distilled to include sixteen themes. The major concern of the parents in this case, was that the Holt series presented a one-sided view of the world which excluded their religious beliefs and values.[42] This aspect of the parents' case is supported by a study conducted by the National Institute of Education.[43] Testimony, by the author of that study at the trial on remand, suggests that the Holt series contains a pervasive bias against the religious beliefs of the plaintiffs which stems from both omission and denigration of Judeo-Christian values. According to the appellees' brief, no single story in the Holt series standing alone would have caused the parents "to draw the line"[44] that they feel the schools could not cross without violating their right to free exercise; however, the lack of balance in the Holt series does cross the parents' line and raises first amendment questions. The appellees' brief states that they do not object to mere exposure of their children to ideas contrary to their Fundamentalist Christian beliefs but rather to the constant barrage of such themes without a balancing presentation of "traditional" Ameri-

42. *Id.* at 11-13, 26-33.

43. *Id.* at 26-33. *See also* PAW STUDY, *supra* note 4. PAW has conducted a study of religion in public school textbooks which also supports this argument. A study conducted by a liberal public interest group, AMERICANS UNITED FOR SEPERATION OF CHURCH AND STATE, TEACHING ABOUT RELIGIOUS FREEDOM IN AMERICAN SECONDARY SCHOOLS (1985) [hereinafter AU STUDY] supports Appellees' lack of balance argument.

44. Brief for Appellee Parents, *supra* note 27, at 51. *See also* Thomas v. Review Bd., 450 U.S. 707, 715 (1981).

can Christian values. Nor do the parents demand that the public schools teach their religious beliefs to all children. Rather, the plaintiff parents' demand is for the schools to teach in such a way as not to offend or denigrate their Fundamentalist Christian beliefs. Vicki Frost testified on remand:

> I can deal with small offenses but when you come over to burden and continuously over and over and over story after story after story, with virtually nothing to counteract that or nothing to balance that from, you know, from our religious viewpoint, you're proving my point, very well about offense and burden. Something can be a little offensive and you tolerate it but there comes a point where toleration moves to burden.[45]

According to Bob Mozert:

> [T]he families derive their religious beliefs from the entire Bible, and [believe] that they could not violate any [b]iblical teaching. For them to disobey a [b]iblical command would result in spiritual or physical punishment. . . . The children from these families also could not merely study the Holt books that violate their religious beliefs, even if the children were not forced by school officials to believe the ideas expressed in the readings. . . . [S]tudying these religiously offensive materials violates the Bible, which says 'learn not the ways of the heathen,' and, 'have no fellowship with the unfruitful works of darkness, but rather reprove them, for it is shameful even to mention what the disobedient do in secret.'[46]

Many themes in the Holt series were found to be biblically forbidden by the parents and these objections were set forth in their brief. Such themes specifically included: futuristic supernaturalism ("man as God"), evolution, humanism (using "man as the measure of all life"), one world government ("syncretism"), contrasting belief in the supernatural with science, situational ethics, values clarification, magic, denial that there is life after death, teaching that heaven and hell do not exist, teaching that all religions are merely different roads to God, skeptical portrayal of religion, pacifism, elimination of sexual roles, reversal of sexual roles, and questioning authority, including that of parents.

Defendants characterized the plaintiffs' objections in a manner similar to that of both the court and the plaintiffs; however, defendants couched the objections in such a way as to emphasize the conflict between the parents' values and the objectives of the Tennessee public schools.[47] For example, defendants stated plaintiffs' objections to the process of "values clarification" as follows:

> The plaintiffs . . . object to the exploration of moral dilemmas in stories and to their children being exposed to views on many complex issues. They do not want a teacher to ask their chil-

45. Brief for Appellee Parents, *supra* note 27, at 40.

46. Brief for Appellee Parents, *supra* note 26, at 14 (quoting *Jeremiah* 10:2 and *Ephesians* 5:11-12, respectively).

47. Brief for Appellant Schools, *supra* note 18, at 14-17. *See supra* notes 6-14 and accompanying text for a discussion of those objectives.

> dren to understand how a character in a story feels or to apply their values to a story in order to decide whether a character in a story did the right thing.[48]

The parents' objections to the material presented by the Holt series and the response of the Hawkins County Public School system will serve as the focus of this paper. The plaintiff parents' objections are essentially the same as those raised by Fundamentalist Christians throughout the United States over the last several years.[49] The response of the school board and officials is not atypical. This struggle over curriculum poses constitutional questions as to who will control the public schools of this country—parents, professional educators, or the courts.

PROCEEDINGS IN THE CASE

Tennessee Eastern District Court Summary Judgment Holdings

The plaintiffs and their children filed a civil rights action on December 2, 1983.[50] They sought injunctive relief to provide reading programs alternative to the Holt series as well as money damages, alleging violation of both their first amendment right to free exercise and the fundamental right of parents to control the education, as well as religious and moral instruction of their children. The case proceeded through two memorandum opinions which resulted in dismissal by the Eastern District Court of Tennessee in 1984. An appeal went to the Sixth Circuit Court of Appeals in 1985 resulting in a reversal and remand. A memorandum decision was entered on remand in 1986. A second appeal went to the Sixth Circuit in 1987. Certiorari was denied by the United States Supreme Court in 1988.

In the first memorandum opinion the court stated plaintiffs' position as:

> [T]heir First Amendment freedom to believe as they choose is meaningless if the state can force their children to read books that contain ideas and values to which they do not subscribe. . . . The complaint contains no allegation that the defendants are attempting to coerce the school children into performing any symbolic act, subscribing to any particular value, or professing any particular form of belief. The plaintiffs' assertion appears to be that the mere *exposure* to this broad spectrum of ideas and values which they find offensive amounts to a constitutional violation.[51]

The court held that only one claim, which alleged that the Holt series teaches that one does not need to believe in God in a specific way but that any faith in the supernatural can lead to salvation, may have stated a violation of plaintiffs' constitutional right to free exercise. This would be so only if the Holt series "appear[s] to assert that salvation or some form

48. Brief for Appellant Schools, *supra* note 18, at 11.

49. *See infra* notes 84-91 and accompanying text.

50. The plaintiffs' action was based on 42 U.S.C. § 1983 (1982).

51. *Memorandum Opinion I*, 579 F. Supp. 1051, 1052 (E.D. Tenn. 1984) (emphasis added).

of religion is necessary at all or that no religion is necessary."[52] The court found that plaintiffs had not specified which parts of the Holt series would substantiate their claim. Citing *Williams v. Board of Education*,[53] the court held that there was no constitutional right protecting "plaintiffs from *exposure* to morally offensive value systems or from exposure to antithetical religious ideas."[54] Consequently, the court partially granted and partially denied defendants' motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, and required the plaintiffs to substantiate their allegations regarding the one possible constitutional claim.

After plaintiffs presented specific citations to those parts of the Holt series which allegedly taught that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation, the district court rendered its second memorandum opinion.[55] The court again cited *Williams* for the proposition that the first amendment does not guarantee religious freedom from exposure to ideas and stated that "[w]hat is guaranteed is that the state schools will be neutral on the subject, neither advocating a particular religious belief nor expressing hostility to any or all religions."[56] Finding that the Holt series "carefully adopt[s] this constitutionally mandated neutrality,"[57] the court dismissed the case.

On appeal, the Sixth Circuit stated the standards to be used in deciding free exercise claims:

> [C]ourts apply a two-step analysis. First, it must be determined whether the government action does, in fact, create a burden on the litigant's exercise of his religion. If such a burden is found, it must then be balanced against the governmental interest, with the government being required to show a compelling reason for its action.[58]

In analyzing the parties' cases, the Sixth Circuit noted the parents' assertions that their sincerely held religious beliefs were violated by exposure to the Holt series and that refusal to participate in the offensive reading program would lead to expulsion of their children from the Hawkins County Public Schools thereby denying them a government benefit because of their religious beliefs. Defendants' denial that the parents' religious beliefs were sincerely held and that mere exposure to the Holt series could offend such beliefs raised material issues of fact and law, thus making the district court's dismissal improper. Further, defendants alleged that their interest in teaching reading to elementary school students in the system was a compelling state interest justifying infringement of the plaintiffs' free exercise rights and that accommodat-

52. *Id.*
53. 388 F. Supp. 93 (D.W. Va. 1975), *aff'd*, 530 F.2d 972 (4th Cir. 1975).
54. *Memorandum Opinion I*, 579 F. Supp. at 1053 (emphasis added).
55. *Memorandum Opinion II*, 582 F. Supp. 201 (E.D. Tenn. 1984).
56. *Id.* at 203.
57. *Id.*
58. *Circuit Six I*, 765 F.2d 75, 78 (6th Cir. 1985) (citations omitted).

ing the demand for alternative reading programs would be a violation of the establishment clause. The plaintiffs countered this allegation and claimed that their proposal for alternative reading programs would not impair the schools' ability to teach reading. The Sixth Circuit found that these assertions also raised significant issues of law and fact and reversed the dismissal by the district court, remanding the case for resolution of these issues.

On remand, Chief Judge Hull noted the importance of this case:

> This action juxtaposes two of our most essential constitutional liberties—the right of free exercise of religion and the right to be free from a religion established by the state. Moreover, it implicates an important state interest in the education of our children. The education of our citizens is essential to prepare them for effective and intelligent participation in our political system and is essential to the preservation of our freedom and independence.[59]

Judge Hull quoted the standard of review required by the Sixth Circuit and added that "it must be determined whether the state has acted in a way which constitutes 'the least restrictive means of achieving [the] compelling state interest,' as measured by its impact upon the plaintiffs."[60] Threshold issues in determining whether free exercise rights have been impermissibly burdened involve the determination of whether the beliefs asserted to be violated are religious and whether they are sincerely held by those asserting them.[61] In the instant case, these facts were stipulated by the parties. An assertion by the schools that the religious beliefs allegedly burdened must be "central to the plaintiffs' faith" before they are entitled to first amendment protection was rejected by Judge Hull as being based on dicta from the cases cited.[62] Judge Hull then agreed with the parents' assertion that the Holt series lacked balance in its presentation of values:

> It appears to the court that many of the objectionable passages in the Holt books would be rendered inoffensive, or less offensive, in a more balanced context. The problem with the Holt series, as it relates to the plaintiffs' beliefs, is *one of degree*. One story reinforces and builds upon the others throughout the individual texts and the series as a whole. The plaintiffs believe that, after reading the entire Holt series, a child might adopt the views of a feminist, a humanist, a pacifist, an anti-Christian, a vegetarian, or an advocate of a 'one world government.'
>
> Plaintiffs sincerely believe that the repetitive affirmation of these philosophical viewpoints is repulsive to the Christian faith—so repulsive that they must not allow their children to be exposed to the Holt series. This is their *religious* belief. They

59. *Remand Decision*, 647 F. Supp. 1194, 1195 (E.D. Tenn. 1986) (citations omitted).

60. *Remand Decision*, 647 F. Supp. at 1197 (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).

61. Judge Hull cited Wisconsin v. Yoder, 406 U.S. 205 (1972) and United States v. Seeger, 380 U.S. 163, 185 (1965).

62. *Remand Decision*, 647 F. Supp. at 1198.

> have drawn a line, 'and it is not for us to say that the line [they] drew was an unreasonable one.'[63]

Judge Hull turned to *Thomas v. Review Board*[64] for the test to determine whether the state's action burdened plaintiffs' right to free exercise of their religion. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[65] The court then considered the precedents, which included *Thomas*, *Sherbert v. Verner*,[66] *Spence v. Bailey*,[67] and *Moody v. Cronin*.[68] Both *Thomas* and *Sherbert* were cases based on denial of unemployment benefits to persons who lost their jobs because of refusing to work in certain situations for religious reasons. In both cases, the Supreme Court held for the religionists on the basis of the Free Exercise Clause. In the two lower court decisions, school children had refused to participate in certain classes because of their religious beliefs. In both cases the courts found that denial of diplomas, suspension, expulsion, and other punishments constituted infringement of the right to free exercise. In light of these cases, Judge Hull found that the Hawkins County School Board had "effectively required that the student-plaintiffs either read the offensive texts or give up their free public education" thus denying them a government benefit on the basis of their religious beliefs and violating their right to free exercise.[69]

The court looked again to *Thomas* for the standard to determine whether this burden on the parents' and students' right to free exercise of their religion was justified by a compelling state interest.

> The mere fact that the [plaintiffs'] religious practice is burdened by a government program does not mean that an exemption accommodating [their] practice must be granted. The state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest.[70]

Judge Hull found that "[p]roviding public schools ranks at the very apex of the function of a state."[71] The ultimate issue in this case, in the eyes of Judge Hull, is whether Tennessee, acting through its local school board in Hawkins County, "can achieve literacy and good citizenship for all students without forcing them to read the Holt series."[72] Based on

63. *Id.* at 1199 (emphasis added) (citations omitted).
64. 450 U.S. 707 (1981).
65. *Remand Decision*, 647 F.Supp. at 1199 (quoting Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)).
66. 374 U.S. 398 (1963).
67. 465 F.2d 797 (6th Cir. 1972).
68. 484 F. Supp. 270 (C.D. Ill. 1979).
69. *Remand Decision*, 647 F. Supp. at 1200.
70. *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).
71. *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).
72. *Id.* at 1201.

the facts that Tennessee permits education of its students in both private schools and at home in addition to its public schools and that the state had approved several basic reading series for use in its public schools, the court concluded that there were acceptable alternatives for achieving the compelling state interest in educating its students which would be less restrictive than that proposed by the Hawkins County Public Schools.[73] Judge Hull's opinion refuted the assertion by the schools that the difficulty in administering alternative reading programs renders implementation of such programs impossible by referring to expert testimony that "the state's interest in uniformity is by no means absolute" because teaching is best accomplished through individualized education.[74] The fact that in the future the parents' and students' objections might extend to other portions of the curriculum of the Hawkins County Public Schools was found to be irrelevant because those objections and the instant case were limited to the reading program, with the line being drawn only at the Holt series as being intolerable to the plaintiffs' religious beliefs. The fact that nine students were accommodated in alternative reading programs for a significant part of the school year, without disruption of the educational process, belied defendants' argument based on such disruptions. The court found that granting plaintiffs' request for an alternative reading program would not bring a flood of requests for alternative programs from everyone with an objection to some aspect of the public school curriculum. The court denied that there would be such a flood but was careful to limit its holding to the facts of this case.[75]

In granting relief to plaintiffs, the court recognized that by accommodating their religious objections, the schools might be seen as violating the establishment clause by causing the state to become excessively entangled with religion through its schools.[76] The court stated: "It is hard to imagine any reading program for the plaintiffs offered at the schools which would not present Establishment Clause problems."[77] To avoid this problem, the court made use of the "opt-out" provision in the Tennessee statutes,[78] whereby students and parents may choose a home schooling option rather than attending the public schools. The court extrapolated from this statute and held that plaintiffs in this case may opt-out of the reading program in the Hawkins County Public Schools. If students elect not to participate in the reading program at the schools, home schooling in reading would provide a satisfactory alternative without an excessive entanglement of the state in religion through its schools. The court required that the reading proficiency of students opting out be rated by standardized tests already in use by the

73. *Id.*
74. *Id.*
75. *Id.* at 1202.
76. Excessive entanglement of the government with religion is a part of the test, defined in Lemon v. Kurtzman, 403 U.S. 602 (1971), used to determine whether there has been a violation of the Establishment Clause.
77. *Remand Decision*, 647 F. Supp. at 1203.
78. TENN. CODE ANN. § 49-6-3050 (Supp. 1988).

state; any deficiencies would have to be corrected. The court left the details of such a program to the parents and professional educators.

Upon appeal of the remand decision, a three judge panel of the Sixth Circuit Court of Appeals unanimously reversed and remanded Judge Hull's decision with directions to dismiss the complaint.[79] Chief Judge Lively wrote the opinion for the court. This decision focused on the fact that the plaintiff students were not compelled to believe or to assert a belief in ideas contrary to their religion. Upon remand, the court relied on testimony and found that plaintiffs never asserted that the materials objected to actually offended plaintiffs' religious beliefs but only that they *could* be so interpreted.

> Both witnesses [Vicki Frost and Bob Mozert] testified under cross-examination that the plaintiff parents objected to passages that expose their children to other forms of religion and to the feelings, attitudes, and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that plaintiffs' views are the correct ones.[80]

The Sixth Circuit panel identified the threshold issue as being whether a government requirement that a person be exposed to ideas objectionable to his or her religious beliefs can be a burden on the constitutional right to free exercise. Chief Judge Lively referred to an affidavit filed by the Superintendent of the Hawkins County schools which distinguishes inculcation of values from mere exposure to them: "exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed."[81] Repeated exposure is no more inculcation than is a single such occurrence. Further, there was no proof that any plaintiff student was ever required to affirm a religious belief or to act in any way either required or forbidden by his or her religious beliefs. Citing plaintiffs' testimony, the court found that it was unlikely that a more balanced presentation would satisfy their objections since to them there is only one acceptable religious viewpoint: the "biblical" one that they hold. To accommodate plaintiffs' religious views the schools would necessarily violate the establishment clause under the holding of *Epperson v. Arkansas*[82] because such an accommodation would be to tailor a public school's curriculum to satisfy religious principles or prohibitions.[83]

> Balance in the treatment of religion lies in the eye of the beholder. Efforts to achieve the particular "balance" desired by any individual or group by the addition or deletion of religious material would lead to a forbidden entanglement of the public schools in religious matters, if done with the purpose or primary effect of advancing or inhibiting religion.[84]

79. *Circuit Six II*, 827 F.2d 1058, 1070 (6th Cir. 1987).
80. *Id.* at 1062.
81. *Id.* at 1063.
82. 393 U.S. 97 (1968).
83. *See infra* notes 207-09 and accompanying text.
84. *Circuit Six II*, 827 F.2d at 1065 (citations omitted).

Judge Lively found that the district court incorrectly applied the standards of *Sherbert* and *Thomas* to the instant case. Those cases were distinguished because there was government *compulsion* to engage in conduct which violated the plaintiffs' religious convictions. In the instant case, absent any showing that reading and discussing the Holt series involved affirmation or denial of religious beliefs or performance or non-performance of religious acts, there could be no violation of the right to free exercise. The Sixth Circuit held that in order for the free exercise clause to be violated there must be an element of government compulsion.[85]

Chief Judge Lively also distinguished the case of *Wisconsin v. Yoder*[86] from the instant case because the decision in that case was based on the unique circumstance that compulsory attendance at public school until the age of sixteen actually threatened the existence of the Old Order Amish way of life through exposure of Amish children to the outside world. In the instant case, plaintiffs insist that their children acquire all the skills necessary to live in the outside world but take exception to their exposure to certain ideas. In addition, there was no threat to plaintiffs' religious practices posed by exposure of their children to the ideas objectionable to those religious beliefs. The court found that the plaintiff parents could avoid such exposure by choosing the options provided by Tennessee law: private or home schooling.

The Sixth Circuit opinion cites *Bethel School District v. Fraser*[87] as standing for the proposition that the public schools serve the purpose of inculcating democratic values, including "tolerance of divergent political and religious" ideas while at the same time respecting others' beliefs.[88]

> The 'tolerance of divergent . . . religious views' referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must 'live and let live.'[89]

The opinion also recognizes the ability of local school authorities to determine the curriculum for their school systems without interference by the courts so long as that curriculum does not violate the fundamental rights of students, teachers, or parents.[90]

Judge Lively summarizes the holding in the case:

> [T]he requirement that public school students study a basal reader series chosen by the school authorities does not create

85. The Sixth Circuit Court based its decision upon precedents such as Board of Education v. Barnette, 319 U.S. 624 (1943); Engel v. Vitale, 370 U.S. 421 (1961); and School District of Abington Township v. Schempp, 374 U.S. 203 (1963). For a discussion of these cases see *infra* notes 178-89, 196-206 and accompanying text.

86. 406 U.S. 205 (1972).

87. 478 U.S. 675 (1986).

88. *Id.* (citing *Circuit Six II*, 827 F.2d at 1068).

89. *Circuit Six II*, 827 F.2d at 1069.

90. *See infra* notes 193-200 and accompanying text.

> an unconstitutional burden under the [f]ree [e]xercise [c]lause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion. There was no evidence that the conduct required of the students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series "could" or "might" lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs. This is not sufficient to establish an unconstitutional burden.[91]

IMPLICANTIONS OF THE *MOZERT* CASE FOR PUBLIC EDUCATION

Overview of Fundamentalist Christian Objections to Public Education

The list of the plaintiffs' objections in the *Mozert* case is a statement of the general objections that Fundamentalist Christians have to American public education generally.[92] Additional goals not brought to light by the case include a return to the phonics method of teaching reading[93] and creation of a "voucher tuition-credit system" to be used by parents to send their children to the school of their choice, public or private, rather than be burdened with both taxes to support the public schools and tuition.[94] These goals are not addressed in this paper.

The conservative Christian position regarding education is most succinctly stated in the "STUDENT'S BILL OF RIGHTS."

> 1. THE RIGHT TO BE TAUGHT TO READ THE ENGLISH LANGUAGE IN THE FIRST GRADE. If I am unable to read materials available in my home by mid-year of the First Grade, I have been denied my right and should be transferred immediately to an intensive Phonics method of instruction.
> 2. THE RIGHT TO PRIVACY. Schoolpersons may not force me to discuss, or play Magic Circle, or answer questions, write assignments, or keep journals about my religion, moral values, family, attitudes and feelings, sex behavior and private parts of the body, political attitudes, or what I and my family do at home.
> 3. THE RIGHT TO MY RELIGIOUS FAITH AND BELIEFS. Schoolpersons may not force me to do assignments or engage in classroom activities which criticize or downgrade my religion. Examples of such practices are: teaching that any religion or non-religion is as good as another, that there are many gods, or that God did not create the world; teaching witchcraft, the occult, or astrology; conducting Eastern mysticism, yoga, Transcendental Meditation (TM), Quieting Reflex (QR), guided fantasy or imagery, or "stress" courses using hypnotic practices.
> 4. THE RIGHT TO SHARE INFORMATION WITH MY PARENTS by taking home any textbooks, materials, lessons, and assignments,

91. *Circuit Six II*, 827 F.2d at 1070.
92. *See supra* notes 41-49 and accompanying text.
93. STUDENT'S BILL, *supra* note 1.
94. *See* Miller, *supra* note 3.

and by giving them access to computer software and sound and video tapes of classroom activities.

5. THE RIGHT TO HAVE AND TO HOLD MY MORAL VALUES AND STANDARDS, MY POLITICAL OPINIONS, AND MY CULTURAL ATTITUDES. Schoolpersons may not impose on me the value system that ethics are situational or that moral dilemmas have no right or wrong answers; may not ask me to make personal decisions whether to lie, to cheat, to steal, to take drugs, to drink alcohol, to engage in premarital sex with either gender, or to kill (as promoted in the "lifeboat game" or in discussions of abortion, euthanasia, and suicide); may not require me to role-play open-ended psychological problems; may not put me in a school environment of premarital promiscuity by the in-school dispensing of contraceptives and abortion services.

6. THE RIGHT TO ALTERNATE ASSIGNMENTS WHEN I OR MY PARENTS BELIEVE THAT SCHOOLPERSONS ARE VIOLATING MY RIGHTS OR IMPOSING UPON ME LESSONS, FILMS OR MATERIALS INAPPROPRIATE FOR MY GRADE LEVEL. Since thousands of good books and materials are easily available, when I or my parents object to a course, book, or assignment, schoolpersons have the duty to give me alternate schoolwork for full credit and without discrimination. Schoolpersons have the obligation to notify parents when classroom materials may be objectionable (such as the film "The Lottery").

7. THE RIGHT TO HAVE MY FAMILY TREATED WITH RESPECT. Schoolpersons may not, through lesson, film or innuendo, convey the notions that parents are old-fashioned, untrustworthy, uninterested in me, have obsolete values and attitudes, or might abuse me. When my parents exercise their rights to excuse me from a course, class, book or assignment, schoolpersons may not retaliate against them or me, embarrass me in front of my classmates, or take action against me which is perceived as punishment or humiliation.

8. THE RIGHT TO BE INSPIRED AND ENCOURAGED BY CLASSROOM LESSONS, NOT DEPRESSED OR DISTURBED. I have the right to be taught the greatness of America and our Constitution, and that ours is a land of freedom and opportunity for those who learn, work hard and persevere. Schoolpersons may not depress me with lessons, discussions or films about death, dying, violence, surgery, suicide, or dire predictions about the end of the world.

9. THE RIGHT TO THE SANCTITY OF MY BODY AND TO SAFETY ON THE SCHOOL PREMISES. Schoolpersons may not touch me in the private parts of my body, or talk to me about touching me in my private parts. Schoolpersons have the obligation to provide for my security against physical attack and abuse, vandalism or theft of my property, peddlers of illegal drugs, and the use of profanity, blasphemy or vulgarity by schoolpersons or students.

10. THE RIGHT TO FULL COMPLIANCE WITH FEDERAL AND STATE LAWS. Schoolpersons have the obligation to give full notification to parents and students about applicable laws and the procedures to implement them. Schoolpersons have the obligation to comply fully with all laws requiring parental con-

> sent for certain courses or materials, as well as all laws mandating such exercises as the daily recital of the Pledge of Allegiance to the American Flag or studies in the U.S. Constitution.[95]

This statement goes beyond the objections of the plaintiff parents in *Mozert* by including the requirement of full compliance with federal and state laws and the right to physical and emotional safety on school grounds. Certainly, no person could rationally take issue with the right of a student to be safe while at school, but many of the other so-called rights propounded by the Eagle Forum, which wrote the "Students Bill of Rights," are at least controversial and at worst egregious, especially in light of the traditional role of public education in the United States and Supreme Court rulings regarding religion in the public schools.[96]

The pamphlet containing this statement of students' rights also contains two other lists, setting out "THE STUDENT'S RESPONSIBILITIES" and "THE PILLARS OF SUPPORT FOR PUBLIC SCHOOLS." The list of student's responsibilities are statements that students will respect their fellow persons in the school community and act "properly" as students, generally promising to comport themselves consistently with the obligations imposed by their "BILL OF RIGHTS." The "PILLARS OF SUPPORT" language is more controversial:

> 1. In the public school classroom, the child is a captive audience and schoolpersons are authority figures. This authority is limited by the students' rights, their parents' rights, and the constant supervision of citizens and taxpayers.
> 2. All individuals who utilize taxpayers' money must accept citizen surveillance of their decisions and performance of duties. This applies to the President, Congress, federal, state and local officials, school board members, librarians, and all school personnel.
> 3. Under U.S. law and Supreme Court decisions, parents are the primary educators of their children. All school courses, materials and activities are subject to the primary control of parents acting in supervision of their own children and in the unhampered exercise of their constitutional rights.[97]

Propositions one and two are not particularly arguable in that they are statements of conventional wisdom. Could anyone seriously argue that school children are *not* a captive audience? However, the assertion in proposition three which states that "under United States law and Supreme Court decisions, parents are the primary educators of their children," may be drawing too fine a point from precedent.[98] Primary control of the curricula of the public schools properly lies in the hands

95. STUDENT'S BILL, *supra* note 1.

96. *See infra* notes 94-144 and accompanying text for a discussion of the role of values education in public education in the United States; *see infra* notes 158-223 and accompanying text for a discussion of Supreme Court precedent regarding religion and parents' rights to determine curriculum content in the public schools.

97. STUDENT'S BILL, *supra* note 1.

98. *See infra* notes 158-223 and accompanying text for a full discussion of federal judicial precedent regarding the rights of parents to control public school curricula.

of professional educators who are *guided* by community standards as well as federal, state and local law.

The remainder of this Note will consider both traditional and current viewpoints as to the nature and goals of public education and whether there can be a reasonable accommodation of the Fundamentalist Christians' demands that would leave the public education system of the United States able to carry out its mandate and abide by Supreme Court precedent with regard to the religion clauses.

THE ROLE OF THE PUBLIC SCHOOLS AND VALUES EDUCATION IN THE UNITED STATES

The Beginnings

Since before the American Revolution, the education of their children has been of great concern to the people of this nation. The earliest efforts to provide education were primarily motivated by religion, with the first schools being associated with churches, providing for the education of ministers and ensuring the ability of churchmembers to read the Bible.[99] Zeal for education, however, was not limited to the colonists or to religious groups. Education was a high priority throughout the frontier period of American history and every section of the growing country sought to provide for the education of its children, as demonstrated by the Ordinance of 1785.[100]

The curricula of the early public school systems were greatly influenced by Protestant Christianity, as reflected in the textbooks used at that time.[101] Sectarianism was avoided, not religion, and the schools

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99. *See generally* WRIGHT, *supra* note 15; NEUFELDT, *Religion, Morality and Schooling* [hereinafter NEUFELDT], in RELIGION AND MORALITY IN AMERICAN SCHOOLING (T. Hunt & M. Maxson ed. 1981) [hereinafter Hunt & Maxson]; D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 8, 138 (1958); Edwards, *Civil Religion and the American Public Schools* [hereinafter Edwards], in Hunt & Maxson, *supra*, at 179; Moskowitz, *The Making of the Moral Child*, 6 PEPPERDINE L. REV. 105, 107-114 (1978) [hereinafter Moskowitz]. *See also* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 n.7 (1963) (Brennan, J., concurring); Lemon v. Kurtzman, 403 U.S. 602, 650 (1971) (Brennan, J., concurring).

100. *See* Elson, GUARDIANS OF TRADITION 3 (1964) [hereinafter GUARDIANS]; WRIGHT, *supra* note 15 (with specific attention on chapters one through four).

An example of the national concept of the importance of education is the Ordinance of 1785 which

> prescribed that each township should be laid out with thirty-six numbered sections of 640 acres each, and that Section 16 [in each township] should be reserved for public education. The Ordinance of 1787 [reauthorizing the earlier Ordinance] had declared that 'religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

WRIGHT, *supra* note 15 (quoting the Ordinance of 1787).

101. *See generally*, WRIGHT, *supra* note 15; GUARDIANS, *supra* note 100; Moskowitz, *supra* note 99; Perko, *Schooling and the American Civil Religion*, in UME PUBLIC EDUCATION POLICY STUDIES (1986) [hereinafter Perko]; H. PERKINSON, TWO HUNDRED YEARS OF AMERICAN EDUCATIONAL THOUGHT (1979) [hereinafter PERKINSON]. Perkinson's book is a compendium of quotations of educational philosophy from some famous and not so famous Americans interspersed with Perkinson's interpretations and comments. American educational thinkers from Franklin and Jefferson to Mann and Dewey invoke various "universal" tenets

promoted Protestant unity.[102] Throughout the nineteenth century, religious aspects of public school education were de-emphasized, at least partly to defuse conflicts between Catholic and Jewish immigrants and the predominant Protestant populace over the way religion would be presented in the schools.[103] The removal of "Judeo-Christian" religious influence has continued to the present day, and it is now widely recognized that textbooks and teachers nationwide actually avoid discussion of Judeo-Christian religion in order to avoid controversy in the classroom and conflict with parents.[104] National enthusiasm for public education, however, continues to the present time, as demonstrated by the attention given educational issues in the news media.

The goals of American public education have been viewed consistently from before its widespread establishment[105] and some have asserted that the general goals of education have been constant throughout the history of western civilization.[106] Prominent early American political leaders, such as Benjamin Franklin and Thomas Jefferson,[107] believed that the purpose of education was to create good citizens capable of contributing to their country's growth and prosperity. In this view, a "good citizen" is able to analyze conflicting viewpoints and to reach reasoned decisions regarding alternative solutions to public problems, whether propounded by politicians or other "experts."[108] Those who have learned the expectations society has of them and who are able to fulfill those expectations are good citizens.[109] The importance of instilling the qualities of good citizenship and loyalty to the national state grew in the late nineteenth and early twentieth centuries as a result of the growth of the frontier, rapid increase in immigra-

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of Protestant ideology in their discussions of the role that education in general and public schooling in particular should play in peoples' lives.

102. NEUFELDT, *supra* note 99, at 10, 15.

103. Perko, *supra* note 101; NEUFELDT, *supra* note 99, at 17-23; D. RAVITCH, THE GREAT SCHOOL WARS (1979) [hereinafter SCHOOL WARS]. Ms. Ravitch studied the history of public education in New York City and believes that the history of those schools is a paradigm for that of the nation's schools in general. *See also*, Illinois *ex rel.* McCollum v. Board of Educ. 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring).

104. Miller, *supra* note 3. *See also* ASCD REPORT, *supra* note 3; PAW STUDY, *supra* note 4; NIE Study, *supra* note 3; AU STUDY, *supra* note 43; Moskowitz, *supra* note 99, at 110; Brief for Appellee Parents, *supra* note 27, at 16-21.

105. *See* M. KATZ, THE IRONY OF EARLY SCHOOL REFORM (1968) [hereinafter KATZ A]; M. KATZ, SCHOOL REFORM (1971) [hereinafter KATZ B]; PERKINSON, *supra* note 101; Perko, *supra*, note 101.

106. P. NASH, A. KAZAMIAS & H. PERKINSON, THE EDUCATED MAN (1982) [hereinafter EDUCATED].

107. PERKINSON, *supra* note 101; T. JEFFERSON, A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), *reprinted in* T. JEFFERSON, WRITINGS 365-373 (M. Peterson ed. 1984) [hereinafter WRITINGS]; T. JEFFERSON, AUTOBIOGRAPHY (1892), *reprinted in* WRITINGS, *supra* at 42-43; T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), *reprinted in* WRITINGS, *supra* at 271-274; Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), *reprinted in* WRITINGS, *supra* at 857-860.

108. *See* WRITINGS, *supra* note 107, at 42-43, 271-74, 365-73, 857-60. All of Jefferson's references to education suggest its importance to him due to his belief that only educated citizens could help preserve the new American republic. *See also* PERKINSON, *supra* note 101, at 158-59.

109. PERKINSON, *supra* note 101, at chapters 3 & 6. *See infra* notes 94-126 and accompanying text for a discussion of the nature of these expectations.

tion and industrialization, and "urbanization," all of which generated concern over the dilution or distortion of "American" culture and values.[110]

Another consistent goal of American public education has been development of each individual to the limit of his or her capability. Some proponents of this viewpoint believe that individual growth is more important than inculcation of the values system maintained by society as a whole (creation of "good citizens").[111] Although some consider these two goals to be in conflict,[112] others assert that they are compatible.[113] A passage from a letter written by Thomas Jefferson to his favorite law professor, George Wythe, states Jefferson's view of the parallel importance of these two aspects of education: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness."[114] Jefferson believed that the only hope for this nation was an independant, educated populace which could make reasoned choices between political candidates and informed decisions in resolving governmental issues, as well as contributing to the growth of prosperity. The role of public education to Jefferson was to promote the intellectual development of all citizens to the best of their abilities so that they could better fulfill their duties as citizens.[115] Jefferson did not believe that the Bible should be taught at the elementary or grammar school level.[116]

The American Civil Religion and Values Education

> [T]here is a "religion," or set of values and normative behaviors, held in common by the majority of Americans that gives a sense of unity and purpose and provides meaning for lives. This civil religion need not conflict, though it sometimes does, with whatever church affiliations people hold. Often, in fact, it is already supported by denominational institutions, particularly by those of conservative Christian traditions.[117]

An interesting and thoughtful view of the function of public schools in the United States has been presented in connection with the concept of

110. Moskowitz, *supra* note 99, at 109-110; Perko, *supra* note 101, at 13; NEUFELDT, *supra* note 99, at 23-24; Vallance, *Hiding the Hidden Curriculum* [hereinafter Vallance], in HIDDEN CURRICULUM, *supra*, note 11, at 18-19.

111. *See generally* PERKINSON, *supra* note 101, at chapter 9; HIDDEN CURRICULUM, *supra* note 11.

112. PERKINSON, *supra* note 101, at chapter 9; HIDDEN CURRICULUM, *supra* note 11; KATZ B, *supra* note 105, at 88.

113. PERKINSON, *supra* note 101, at chapter 9 (with specific attention to 310); Miller, *supra* note 3. The belief that these two goals are compatible is apparent within the language of the Ordinance of 1787.

114. WRITINGS, *supra* note 107, at 859.

115. *See infra* note 140 (for citations referring to Jefferson's philosophy of education).

116. WRITINGS, *supra* note 97, at 273. Jefferson likely would be maligned today by Fundamentalist Christians for being a secular humanist because of his rather independent views on the relative roles of faith and reason, God and man.

117. Edwards, *supra* note 99, at 180.

the "American Civil Religion."[118]

The central belief of this "religion" is that Americans are chosen by God to establish a new social order on earth. The God of this religion is closely related to order, law, and "right."[119] There is a common set of "saints," including Washington, Jefferson, and Lincoln, who embody honor and good in political leadership. Holidays, such as the Fourth of July and Memorial Day, and national shrines, such as Arlington Cemetery and Gettysburg are also symbols of this religion. The "holy scriptures" of this religion are the Declaration of Independence, the Constitution and the Bill of Rights. The public schools serve to transmit the values of the civil religion and also serve as one of its strongest symbols, its "church."[120] The American Civil Religion unites Americans of all religions in a "common societal faith."[121]

Although the American Civil Religion has not been entirely static, going through periodic revisions in response to changing political and cultural pressures, the values it espouses have been fairly constant.[122] A study of the curricula mandated by statute in each of the fifty states found that inculcation of certain virtues, along with teaching of "basic studies," is required by every state.[123] These virtues include tolerance, patriotism, morality, truthfulness, honesty, generosity, and subordination to authority. These are the same virtues espoused by the American Civil Religion.[124] Citing the striking similarities in public schools throughout the country, despite the fact that each school system is locally controlled, one author identifies the motivation behind universal public education as a major factor in creating this uniformity.

> Anxious over the fate of a fledgling republic, and concerned about the diversity among the immigrants who, by the 1850's, were entering the country at the rate of 200,000 a year, educators such as [Horace] Mann created an institution calculated to effectively socialize children into the civil religion of the republic. . . . All needed to develop a sense of themselves as Americans, and to cultivate those virtues thought necessary for

118. *See generally* AMERICAN CIVIL RELIGION (Richey & Jones. ed. 1974); BELLAH, CIVIL RELIGION IN AMERICA (1968) [hereinafter BELLAH]; YULISH, THE SEARCH FOR A CIVIC RELIGION (1980). Civil religion has been a difficult concept to define because it is an abstraction of a "transcendental faith," but a reasonable definition has been proposed:

> [C]ivil religion is a set of beliefs and attitudes that explains the meaning and purpose of any given political society in terms of its relationship to a transcendent, spiritual reality, that are held by the people generally of that society, and that are expressed in public rituals, myths, and symbols.

Edwards, *supra* note 99, at 182.

119. BELLAH, *supra* note 118, at 9.

120. *See generally* Edwards, *supra* note 99; Perko, *supra* note 101.

121. Edwards, *supra* note 99, at 181.

122. *See, e.g.*, Perko, *supra* note 101; Edwards, *supra* note 99, at 187.

123. Edelman, *Basic American*, 6 NOLPE SCHOOL L.J. 6, 97-98 (1978) (cited in Perko, *supra* note 101, at 9). For example, the state of Colorado requires that the public schools teach history, culture and civil government, including the contributions of minorities, provide information as to the honor and use of the flag, instruction in the United States Constitution and the value of temperance. COLO. REV. STAT. § 22-1-101 to 119 (1973 & 1984).

124. Perko, *supra* note 101, at 9; Edwards, *supra* note 99, at 186-89. *See generally* Vallance, *supra* note 110.

> democratic life and economic success. . . . The study of American history, inculcation of virtues such as honesty and industry, and concern with developing respect [tolerance] for individual and group differences were all perceived as vital to the survival and prospering of American life.[125]

Thus, the public school systems throughout the United States serve to instill the democratic values commonly held by the vast majority of the population, those of the American Civil Religion.[126]

THE AMERICAN CIVIL RELIGION AND FUNDAMENTALIST CHRISTIANS

Struggles over curricula of the public schools and the precepts of the American Civil Religion have occurred from time to time in the history of American public education. These struggles generally have reflected the efforts of groups with new-found political strength challenging the precepts of the American Civil Religion and demanding that their views be incorporated within it.[127] The American Civil Religion has accommodated such changes in the past and is likely to do so in the future. The current "battle for the public schools" is simply the most recent manifestation of this sort of struggle, pitting Fundamentalist Christian ideologies against the more widely held "nonsectarian" tenets of the American Civil Religion.

Civil religion is not all good. Dangers inherent in it include a nationalism in which the state itself becomes the center of worship rather than serving to bind together its citizens by means of common historic events and traditions.[128] Fusion of God and nation can become a rationale for attacking nonconformist or non-conservative ideas or groups and for strengthening the position of conservative, jingoistic groups.[129] Anyone disagreeing with the chauvinistic beliefs of such groups is branded as irreligious, immoral and unfit to hold political office.[130]

Another danger in the American Civil Religion is that it exemplifies "male WASP culture,"[131] ignoring the contributions of women as well as those of other ethnic and racial groups to our national development. The danger in this is that "[w]hen one believes that God has chosen the white man in America to rule the world, it follows that the destruction of others is simply doing the will of Divine Providence. According to this view, any means is morally right if the world is thus 'made safe for democracy.' "[132] It is arguable that United States involvement in Viet Nam and the political repression of opposition to the war was at least in part a negative manifestation of the American Civil Religion.

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125. Perko, *supra* note 101, at 13.
126. Vallance, *supra* note 110, at 9-10.
127. *See generally* SCHOOL WARS, *supra* note 103; KATZ A, *supra* note 905; KATZ B, *supra* note 105; Perko, *supra* note 101; Edwards, *supra* note 99.
128. Edwards, *supra* note 99, at 185.
129. *E.g.*, BELLAH, *supra* note 118; Edwards, *supra* note 99; Perko, *supra* note 101.
130. Edwards, *supra* note 99, at 185.
131. *Id.*
132. *Id.* at 186.

Many of the Fundamentalist Christians' objectives for reforming public education in the United States may be viewed as exarcerbating the least desirable aspects of the American Civil Religion. Anyone disagreeing with the views of Fundamentalist Christians are branded as immoral and irreligious. Fundamentalist Christians demand that America be portrayed in the schools only as a just and righteous God-fearing nation that can do no wrong. America, as God's chosen nation, should rule the world. The public schools, in which Fundamentalist Christian children are exposed to ideas contrary to those of their parents, are characterized as the center of a conspiracy to destroy the United States by sapping its morality and its will to resist the communist threat. Once the schools sap the technological and moral strength of the United States, it is predicted that it will combine with the Soviet Union in an overarching one-world government that recognizes no God.[133] Thus viewed as an enemy of Fundamentalist Christian ideologies, the public schools must either be radically changed so as to present the "proper Christian perspective" or be destroyed.[134] Some educators and religious leaders believe that destruction of public education is the absolute goal of the Fundamentalist Christians involved in attacks on the public school systems of this nation.[135]

Despite the extreme position they take, Fundamentalist Christians have identified at least one genuine problem with the system of public education and the way that it reflects the American Civil Religion. Studies of textbooks used in public schools throughout the United States have shown that religion and the influences it has had on the development of our nation have been ignored.[136] It is not possible to accurately recount the history of the development of this nation without including a discussion of the influence of Judeo-Christian religion. From the migration of the Pilgrims to the Abolition movement, from the labor struggles of the Industrial Revolution to the Civil Rights movement of the 1960's and the present-day Sanctuary movement, religion has played a vital role in the development and growth of the spirit of this country. Such contributions must be recognized by American public education if it is to accurately reflect and transmit the social values and history of this nation.

As the parents in *Mozert* argue, omission of any reference to a particular religion could be viewed as bias against that religion.[137] The Fundamentalist Christians are a group with recently recognized political

133. *See generally* LaHaye, *supra* note 1; CUNNINGHAM, *supra* note 13.

134. *See* WOOD, *Secular Humanism and the Public Schools*, in UME PUBLIC EDUCATION STUDIES (1986) [hereinafter WOOD]. Wood quotes Jerry Falwell as stating:

> One day, I hope in the next ten years, I trust that we will have more Christian day schools than there are public schools. I hope I live to see the day when as in the early days of our country, we won't have any public schools. The churches will have taken them over again and Christians will be running them.

Id. at 8.

135. Interview with a Colorado educator who asked not to be identified (Apr. 11, 1987).

136. NIE Study, *supra* note 3; PAW STUDY, *supra* note 4; AU STUDY, *supra* note 43.

137. Brief for of Appellee Parents, *supra* note 27, at 26-33.

strength[138] and are asserting their perceived right to have their views incorporated into the American Civil Religion. This situation is similar to those battles already fought to force the American Civil Religion to accommodate "new" or different viewpoints so as to more accurately reflect the overall ideals of American society and should be resolved in the same way.[139] However, it would be wrong to adopt all of the changes in public education demanded by the Fundamentalist Christians, especially with regard to their objections to the methods of teaching used today in most school districts. It is clear that the mandate of the public schools of the United States is to create good citizens who are able to make rational political choices and to foster the greatest individual growth possible.[140] It is also clear that implementing all of the changes in public school curricula demanded by Fundamentalist Christians would inhibit the public schools' ability to achieve that mandate.

Present Professional Concepts of Values Education

Present-day educators believe that the schools have a two-fold responsibility in teaching values and morals.[141] First, consistent with the basic purpose of education, the schools are required to transmit the cultural norms of the society in which they function. This involves teaching the predominant values-orientation of that society as well as its more generalized cultural characteristics and attitudes.[142] Secondly, schools should serve to foster the growth of individual students so that every student reaches maximum potential as a person.[143] However, debate rages over how best to accomplish these dual goals; and, there is debate over their relative importance. For example, should society's values and moral framework be inculcated in students, that is, imprinted on them by means of a doctrinal approach that brooks no exception? Or should the schools teach students the general outlines of societal standards, exposing them to as many differing viewpoints as possible and then equip each student with the skills necessary to make his or her own choice as to which values-system is preferred?

The generally accepted view among educators is that mere inculca-

138. The "Moral Majority" was first recognized by most people as a politically powerful group during the campaign for the 1980 presidential election.

139. *See infra* notes 153-57 and accompanying text.

140. *See supra* notes 94-126 and accompanying text.

141. *See generally* HIDDEN CURRICULUM, *supra* note 11; Hunt & Maxson, *supra* note 99; DEVELOPMENT OF MORAL REASONING (Cochrane Manley-Casimir ed. 1980) [hereinafter DEVELOPMENT OF MORAL REASONING]; Moskowitz, *supra* note 99; GALABRAITH & JONES, MORAL REASONING (1976) [hereinafter MORAL REASONING]; NATIONAL EDUCATION ASSOCIATION, VALUES CONCEPTS AND TECHNIQUES (1976) [hereinafter NEA VALUES]; KAY, MORAL EDUCATION (1975) [hereinafter KAY]; MORAL EDUCATION (Crittendon & Sullivan ed. 1971).

142. *See supra* notes 94-126 and accompanying text. Both Edwards and Perko argue that the ACR comprises this aspect of education in the United States. *See also* Maxson, *The Impact of Schooling on Children's Acquisition of Values* [hereinafter Maxson], in Hunt & Maxson, *supra* note 99, at 201.

143. *See generally* PERKINSON, *supra* note 101; HIDDEN CURRICULUM, *supra* note 11. Although some perceive the emphasis on individual growth as a recent development, beginning in the twentieth century, it is clear that Jefferson favored public education because it would help students achieve the most that they could in life.

tion of values and morals on students is not effective.[144] A person can "know" what decision is morally correct and not act consistently with that knowledge. In order to effectively learn values systems or morality, students need to be able not only to recognize the "correct" choice in circumstances "testing" their morality, but also to act on that choice.[145] Educators, educational sociologists, psychologists, and philosophers differ as to the best approaches to be used in developing the ability to act morally. However, most of these professionals agree that acting morally is a rational process involving consideration of alternative actions and choosing that action which fits each individual's perceptions as to what is moral.[146] Exposure to alternative solutions to moral dilemmas and the ability to project oneself into the situation of another are widely agreed to be important in fostering moral development.[147] The ability to reason analytically and to think critically are essential in fostering the moral development of children. Moral development involves incorporating a values system into one's life. Most people in the United States adhere to a common values system which has been identified by some as the American Civil Religion.[148]

Current psychological research suggests that children learn best through experience, whether genuine or vicarious, and that imagery, role-taking and role-playing are techniques important in developing thinking skills as well as socially acceptable values. These techniques give children the opportunity to "practice" making choices about appropriate behavior in morally ambiguous situations. By practicing in these ways, children can develop their own sense of what is morally correct by applying the values they have learned at home, in church and at school, in ways that are not threatening to their health or safety. Avoiding threats to health and safety is one of the goals of the Student's Bill of Rights.[149] Although Fundamentalist Christians are opposed to role-playing, guided imagery (use of the imagination), critical thinking and reading, and discussion of current social issues involving families, these techniques have found wide acceptance as effective tools in developing values and should not be discarded. Local school boards, on the advice of professional educators, have adopted these techniques throughout

144. *See* Kohlberg, *The Moral Atmosphere of the School* [hereinafter Kohlberg B.], in HIDDEN CURRICULUM, *supra* note 11, at 61; Kohlberg, *The Cognitive-Developmental Approach to Moral Education* [hereinafter Kohlberg A], in NEA VALUES, *supra* note 141, at 18; Cochrane, *Moral Education and the Curriculum*, in DEVELOPMENT OF MORAL REASONING, *supra* note 141, at 60; KAY, *supra* note 141; Maxson, *supra* note 142.

145. *See* Friere, *The Banking Concept of Education*, in HIDDEN CURRICULUM, *supra* note 11, at 283; Fenstermacher, *Manner as Medium for Morals* [hereinafter Fenstermacher], in Hunt & Maxson, *supra* note 99, at 123; Maxson, *supra* note 142; Raths, *Freedom, Intelligence, and Valuing* [hereinafter Raths], in NEA VALUES, *supra* note 141, at 9; Simon, *Values Clarification vs. Indoctrination* [hereinafter Simon], in NEA VALUES, *supra* note 141, at 135.

146. *See* Kohlberg A, *supra* note 144; Kohlberg B, *supra* note 144; Fenstermacher, *supra* note 145; Raths, *supra* note 145.

147. *See* Kohlberg A, *supra* note 144; Kohlberg B, *supra* note 144; KAY, *supra* note 141; MORAL REASONING, *supra* note 141; Moskowitz, *supra* note 99; NEA VALUES, *supra* note 141, at 75 (emphasis on Part Two which is titled "Techniques").

148. *See supra* notes 94-126 and accompanying text.

149. *See supra* notes 94-96 and accompanying text.

the country. Unless it can be demonstrated that these teaching techniques violate the fundamental rights of students, teachers or parents, courts are powerless to interfere.

Present Professional Concepts of Teaching Thinking Skills

Many educators believe that the change from the "Industrial Era" to the "Information Age" requires a change in educational goals and practices. Because of the information explosion, it is now impossible for teachers, charged with the responsibility of teaching "content" curriculum, to cover all of the material involved in their specialties. Thus, there is a need to develop skills in problem solving, reasoning, conceptualization and analysis.[150] In other words, the changing nature of our society requires schools to teach thinking skills as well as facts and, perhaps, to change the emphasis of education away from feeding facts into children's brains to stressing development of thinking skills. Recent developments in educational psychology and neurobiology have improved our understanding of the development of thinking skills.[151] The latest research in these areas suggests that educators should include in every curriculum those mental tactics holding the most promise for multiplying the natural powers of the mind.[152] Typically, the approaches recommended for accomplishing development of thinking skills differ in many respects, but there is general consensus as to the importance of some techniques.[153] Those techniques emphasize classroom discussion, role-taking and role-playing. In other words, involving children in the exercise of thinking, and exposing them to approaches to thinking taken by others, helps them to develop their own abilities. This is accomplished by allowing each student to evaluate not only the approaches to thinking he or she uses, but those of other students as well.[154] Use of current social problems, personal experiences, and literature serve to expose children to interesting situations in which they develop the ability to think, whether the thought process is intended to reach some moral/value decision or to solve a problem in logic or mathematics.[155] If these techniques were not utilized in our public schools, many professionals believe, the quality of education received by American children would decline and students would not adequately be prepared for their

150. McTighe & Schollenberger, *Why Teach Thinking* [hereinafter McTighe], in ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, DEVELOPING MINDS 3 (Costa ed. 1985) [hereinafter DEVELOPING MINDS]. History, science, and social studies are part of the "content" curriculum.

151. *See generally* DEVELOPING MINDS, *supra* note 150; *Frameworks for Teaching Thinking*, 43 EDUCATIONAL LEADERSHIP 3 (1986) [hereinafter *Framework for Thinking*].

152. Perkins, *Thinking Frames*, 43 EDUCATIONAL LEADERSHIP 4, 5 (1986) [hereinafter Perkins].

153. DEVELOPING MINDS, *supra* note 150, at parts VII, VIII; *Framework for Thinking*, *supra* note 151.

154. DEVELOPING MINDS, *supra* note 150, at part VI.

155. *See id.*; Brandt, *Overview*, 43 EDUCATIONAL LEADERSHIP 3 (1986); Perkins, *supra* note 153; Marzano & Arredondo, *Restructuring Schools Through the Teaching of Thinking Skills*, 43 EDUCATIONAL LEADERSHIP 20 (1986); Brief for Appellant Schools, *supra* note 18, at 1-8.

lives as citizens.[156] Schools producing citizens who are unable to think critically and analyze ramifications of possible choices would be failing in their primary function. Schools which did not teach their students to think critically would not be developing each student to their maximum potential and would fall short of the second major goal of public education in the United States.[157]

The statements of professional educators, educational philosophers, sociologists, and psychologists regarding the importance of values/moral education and teaching of thinking skills directly contradict Fundamentalist Christians' preferred approaches to these subjects. This conflict created the most basic issue presented in *Mozert*: Who will control the curriculum of our public schools? In order to suggest an answer to that question, it is necessary to consider Supreme Court decisions in the area of the religion clauses as they relate to the public schools and their curricula.

Teaching About Religion in the Public Schools

Although approaches to teaching religion in the public schools vary somewhat from community to community, there is a consistent policy prohibiting the advancement of or opposition to religion or non-religion.[158] The Supreme Court has indicated that teaching *about* religion is permissible. The Educational Policies Service of the National School Boards Association provides copies of policy guidelines proposed or adopted by local school boards.[159] Several of these policy guidelines serve as the basis of discussion in this section of the note.

A policy guideline adopted by the Boulder Valley Public Schools in Boulder, Colorado in 1977 requires teachers to meet with their building principals at the beginning of the school year if they plan to present school programs which involve religious content. The aim is to insure that such programs actually serve an educational or cultural purpose and are not intended to promote religion. There is an "appeal" process whereby teachers and principals who cannot reach agreement regarding appropriate content for such programs meet with a review committee to be sure that both teacher and principal are complying with the guidelines. There has been a relatively high amount of strife in the Boulder public schools with regard to "religious education," arising mostly from Fundamentalist Christian parents and students.[160]

The policy guidelines from the other school systems are more gen-

156. McTighe, *supra* note 150; Hughes, *Introduction* to DEVELOPING MINDS, *supra* note 150, at 1.

157. *See supra* notes 94-126 and accompanying text.

158. Interview with Lauren Kingsbery, Legal Counsel for the Colorado Association of School Boards (Mar., 1987). Ms. Kingsbery provided copies of policy statements from the States of Colorado and Washington, and the local school boards of Boulder, Colorado, Mountain View, California and Cedar Rapids, Iowa. *See also* ANTI-DEFAMATION LEAGUE, THE PUBLIC SCHOOLS AND GUIDELINES ON RELIGION (n.d.).

159. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

160. Miller, *supra* note 3.

eral than those used in Boulder. These policies state that public schools should remain neutral about religion. The guidelines for Colorado and for the Cedar Rapids public schools incorporate the three-prong test for determining a violation of the establishment clause set forth in *Lemon v. Kurtzman*.[161] In order to pass constitutional muster, school instruction must have a secular purpose, a secular primary effect, and require no excessive entanglement with religion.[162] All these policy guidelines emphasize the importance of religion in our national heritage and in our daily lives but carefully limit teaching to the *effects* and not the dogma of religion. The guidelines prohibit religious exercises, celebrations, and ceremonies. Each stresses the need to avoid either promoting any sectarian or non-religious viewpoint or making children feel uncomfortable about their personal religious faith. Religious music, symbols and displays used in the schools must have an objective, educational purpose. All these policy guidelines are intended to teach the importance of religious tolerance and the acceptance of differences between members of our pluralistic society.

Despite such carefully defined neutral guidelines having been established by the public schools, many teachers are afraid to teach anything which might be perceived as religious or non-religious because of the uproar they anticipate from Fundamentalist Christian parents and pupils.[163] There is a definite chilling effect from the attacks by Fundamentalist Christians on the public schools. According to one educator, this chilling effect is not limited to religion alone but spills over into any area that involves personal feelings, family life, sex education or values clarification.[164]

In *Board of Education v. Pico*,[165] Justice Blackmun emphasized the importance of first amendment liberties and stated that "[t]he classroom is peculiarly the 'marketplace of ideas'; the first amendment therefore 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' "[166] This country is a "marketplace of ideas" and laws that cast a "chilling effect" leading to prior restraint on the free flow of ideas are not favored.[167] Fundamentalist Christians have been able to intimidate public school teachers into avoiding concepts which might arouse the Fundamentalist's ire. This is a form of prior restraint which generates a chilling effect and prevents teachers in the public schools from accomplishing their mandate: developing citizens to their fullest potential.

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161. 403 U.S. 602 (1971).

162. *Id.* at 612.

163. Miller, *supra* note 3; Mertz, *supra* note 3.

164. Interview with a Colorado educator who asked not to be identified (Apr. 11, 1987).

165. 457 U.S. 853, 877 (1982) (Blackman, J., concurring).

166. *Id.* (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

167. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (which states that any system of prior restraint comes to this court with a heavy presumption against its constitutional validity); Near v. Minnesota, 283 U.S. 697 (1931) (which holds that it is the chief purpose of the speech guaranty to prevent previous restraints against publication).

THE SUPREME COURT, THE SCHOOLS AND THE RELIGION CLAUSES

The Supreme Court has often considered the societal role of education generally and of public education specifically.[168] The Court holds the same views of the role of public education as do professional educators, sociologists, and politicians.[169]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[170]

This dictum, quoted from *Brown v. Board of Education*,[171] provides a starting point for a discussion of the Supreme Court's view of the role of public education in our society. This statement is also relevant to the issues raised by *Mozert*. The parallel arises because the basic conflict in *Brown* concerned acknowledgement and acceptance of our ratially pluralistic, democratic society. *Mozert* involved another aspect of the same conflict—given the pluralistic *religious* society of the United States today, can any single religious group, any more than any single racial group, control the curriculum of the public schools?

In *Meyer v. Nebraska*,[172] the Nebraska Legislature passed a statute prohibiting the teaching of foreign languages to students who had not passed the eighth grade. The avowed purpose of the law was "to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals . . . ."[173] The Court acknowledged that states could go "very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . *but the individual has certain fundamental rights which must be respected.*"[174] The Court did not question the right of a state to "prescribe a curriculum for the institutions which

168. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Board of Educ. v. Rowley, 458 U.S. 176 (1982); Ambach v. Norwich, 441 U.S. 68 (1979); Meek v. Pittenger, 421 U.S. 349 (1975); Wisconsin v. Yoder, 406 U.S. 205 (1972); School Dist. of Abington Township v. Schempp, 374 U.S. 202 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

169. *See supra* notes 94-126 and accompanying text.

170. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

171. 374 U.S. 483 (1954).

172. 262 U.S. 390 (1923).

173. *Id.* at 401.

174. *Id.* at 402 (emphasis added).

it supports"[175] but it did strike down the statute because it was applied arbitrarily to prevent language teachers from practicing their profession in violation of the fourteenth amendment. This case is an early recognition by the Court of a state or local government's discretion in controlling the curriculum it has prescribed for its schools and the limit imposed by the Constitution on that discretion.

Pierce v. Society of Sisters[176] resolved a conflict over the right of parents to send their children to private schools in the face of an Oregon statute requiring attendance at public school from the ages of eight to sixteen years or until completion of the eighth grade. Once again the Court used the fourteenth amendment to resolve the issue and found that the statute would interfere with school corporations' business and property. In striking down the statute, the Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for *additional* obligations.[177]

Although the Fundamentalist Christian plaintiffs in *Mozert* cite *Pierce* as supportive of parents' duty and right to prevent standardization of their children by public schools,[178] their reliance is misplaced. The holding in *Pierce* goes only to the fact that states cannot prohibit establishment and maintenance of private schools within their borders. In reaching its decision, the Court considered the fact that existing private schools in Oregon would be denied equal protection of their right to property if the statutory ban on private schools was allowed to stand. The Court acknowledged the pluralistic character of American society by allowing parents to exercise the option to send their children to private schools if they prefer such schools. The Court's statement that parents have the "right and . . . high duty . . . to prepare . . . [their children] for *additional obligations*" refers to training *beyond* that available in public schools, such as religious indoctrination, which should take place at home and in church.

In *West Virginia State Board of Education v. Barnette*,[179] Jehovah's Witnesses children refused for religious reasons to obey a board of education resolution requiring all students to salute the flag. As a result, the children were expelled from school and their parents threatened with punishment. In its decision, applying the free exercise clause to the schools, the Court focused on the fact that the defendants' refusal to comply with the resolution did not interfere with the rights of any other

175. *Id.* at 402. The idea that the states have discretion to determine the curriculum used in the schools it supports runs through the court's decisions relating to schools.
176. 268 U.S. 510 (1925).
177. *Id.* at 535 (emphasis added).
178. Brief for Appellee Parents, *supra* note 27, at 64-68.
179. 319 U.S. 624 (1943).

individuals to salute the flag and that the only conflict was between authority and rights of the individual. Acknowledging *Minersville School District v. Gobitis*,[180] which had upheld the same resolution just three years earlier, the Court recognized that "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of our country.' "[181] "Here, however, [unlike the facts in *Gobitis*], we are dealing with a *compulsion* of students to declare a belief."[182] The Court found that the *Barnette* case turned on the ability of the State to compel *anyone* to profess *any kind* of belief. The Court asserted that government of limited power need not be a weak government and that to protect individuals' rights under such a government "is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[183] The Court utilized the fourteenth amendment to apply the first amendment to the states so as to protect citizens against state power to compel belief. The Court found that boards of education have important functions, and that:

> Boards of Education . . . have . . . discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of [c]onstitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes.[184]

Because the Bill of Rights was intended to protect the minority from tyranny of a majority of the population, the Court stated that each individual's right to life, liberty, and property, to free speech and press, to freedom of assembly and to worship could not be subjected to political controversy and majority determination. Although boards of education have expertise not shared by the courts, which generally is good reason for courts not to interfere in their decisions regarding curricula, the courts will step in to protect individual liberties.

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the [s]tate or of the nature or origin of its authority. We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce

180. 310 U.S. 586 (1940).
181. *Barnette*, 319 U.S. at 631 (quoting *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting)).
182. *Barnette*, 319 U.S. at 631 (emphasis added).
183. *Id.* at 637.
184. *Id.*

> that consent. Authority here is to be controlled by public opinion, not public opinion by authority. . . .
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[185]

The Court overruled *Gobitis* and struck down the requirement of participation in recitation of the pledge by all students. *Barnette* was decided in the midst of World War II, a time when the nation faced an implacable threat from totalitarian enemies and the need for national unity was intensely felt. Despite these circumstances, the Court found that individual liberty was more important than inculcation of uniform beliefs in the schools.

The Sixth Circuit applied the holding of *Barnette* to the *Mozert* case.[186] In so doing, it recognized that mere exposure to ideas cannot threaten an individual's fundamental rights because it involves neither compulsion nor inculcation. The plaintiff parents' reliance on *Barnette* in their brief[187] is misplaced because, although the holding applies to any attempt to compel declaration of a belief, no such compulsion existed in the Hawkins County Public Schools. Moreover, prohibition of exposure of students to ideas, as sought by the parents in *Mozert*, would raise free speech issues and defeat the entire purpose of education.[188] Finally, imposition of the Fundamentalist Christians' educational preferences would interfere with the rights of other students in the schools to receive the best education possible by limiting their exposure to ideas, further removing this case from the four corners of *Barnette*.

In *Everson v. Board of Education*,[189] the Court upheld a New Jersey statutory scheme to provide school bus transportation to students in private schools, most of which were sectarian, because the benefit was to individual students and their parents and not directly to sectarian schools. Despite the result, this case contains language which on its face leaves no doubt about there being a need for a "wall of separation" between church and state.[190] The legacy of this case has been a mixed

185. *Id.* at 641-42. This standard is asserted consistently in Supreme Court cases dealing with the curricula of the public schools. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); School Dist. of Abington Township v. Schempp, 374 U.S. 206 (1963).

186. *See supra* notes 73-83 and accompanying text.

187. Brief for Appellee Parents, *supra* note 27, at 68.

188. The chilling effect of censorship by prior restraint is forbidden by the first amendment right to free speech. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); Mertz, *supra* note 3. Ms. Mertz stated that, in her view and that of many educators, the purpose of education was to expose children to as many ideas as possible so that they will realize the importance of ideas and thinking. *See also* Miller, *supra* note 3 (which corroborates that this concept of education is certainly encompassed within the educational goals and philosophies discussed within *supra* notes 94-126, 127-52 and accompanying text).

189. 330 U.S. 1 (1947).

190. *Id.* at 16.

message to "separationists" and "accommodationists"[191] alike: some interaction between church and state is permissible but not to the extent that the state aids or opposes any one or all religions or non-religion; nor can the state punish persons for having or professing religious beliefs or disbeliefs.

A challenge to the Champaign, Illinois mandatory "time-release program," providing for religious training in public school buildings by church representatives, was involved in *Illinois ex rel. McCollum v. Board of Education*.[192] Relying on *Everson*, the Court found excessive entanglement between church and state and struck down the law. Justice Frankfurter's concurrence in *McCollum* outlined the history of public education in the United States and identified the reasons for secular public education:

> It is pertinent to remember that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. . . . The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the [s]tate undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of [g]overnment from irreconcilable pressures by religious groups, of religion from censorship and coercion, however subtly exercised, requires strict confinement of the [s]tate to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.[193]

Everson and *McCollum* stand for the proposition that there can be no advancement or inhibition of religion in the public schools. Contrary to the plaintiff parents' contentions in the *Mozert* case, this is not due to antipathy toward religion but, at least in part, to a desire to avoid the political and social turmoil that would result from advancing some reli-

191. *See* F. SORAUF, THE WALL OF SEPARATION 8-9 (1976). An "accommodationist" is one who would accommodate the unrestrained interaction between church and state despite the prohibition of the establishment clause.

192. 333 U.S. 203 (1948).

193. *Id.* at 216-17 (Frankfurter, J., concurring). The concern with avoiding political strife over religion in the schools is picked up as dictum in Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). *See also supra* notes 1-5, 96-99 and accompanying text (for an historical overview of strife in the schools over religion).

gious beliefs and not others in the public schools. It has been shown that the public schools in this country have strict guidelines of neutrality with regard to religion and religious teaching.[194] Yet, the plaintiff parents in *Mozert* would have the courts breach the "wall of separation" that has stood between government and religion more or less firmly for two hundred years so that the curricula of the public schools would reflect a "Christian perspective." In their appellate brief, plaintiffs cite the conflict that arose in Hawkins County when they sought to have their viewpoint represented in the curriculum of the local primary and middle schools.[195] Fundamentalist Christians throughout the country would have the public schools breach the "wall of separation" regardless of the resulting strife, even though most public schools are carefully neutral in their approach to religion.

The Court again addressed the role of religion in the public schools in *Engel v. Vitale*.[196] Justice Black, writing for the Court, asserted that the role of the religion clauses is to prevent religious persecution. The Court struck down the required recital of "The Regent's Prayer," a nonsectarian prayer composed by the New York Board of Regents. The Board of Regents is an agency charged with overseeing public education in New York and had composed the prayer in order to promote both spiritual and moral training in the schools. The fact that religious exercises are excluded from the public schools is not an indication of hostility toward religion, rather it is an affirmation of the freedom of each person in the country to choose the way he or she believes and how to express those beliefs. Fundamentalist Christians consistently ignore the plain language used by the Court in its decisions, such as *Engel*, to affirm the importance of religion in our society and rail against those decisions because of their desire to impose their beliefs on the public schools.[197]

In *School District of Abington Township v. Schempp*,[198] the Court, without comment, struck down required reading of the King James Bible in Pennsylvania public schools and the recital of the Lord's Prayer in the public schools of Maryland. *Abington* emphasized the importance of religion in both the development of the country and in the daily lives of citizens and held that the state must remain neutral, neither promoting nor opposing religion or non-religion. In dictum, Justice Clark pointed out that teaching *about* the Bible as literature or the influence of religion historically would offend neither the establishment clause nor the free exercise clause.[199] Justice Clark also examined the interplay between the religion clauses and concluded that "[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predi-

194. *See supra* notes 151-57 and accompanying text.

195. Brief for Appellee Parents, *supra* note 27, at 7-11.

196. 370 U.S. 421 (1962).

197. *See generally* Brief for Appellee Parents, *supra* note 27.

198. 374 U.S. 203 (1963).

199. This viewpoint is picked up in other Supreme Court decisions. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968). The policy guidelines referred to in *supra* notes 147-54 and accompanying text also emphasize this aspect of education and religion.

cated on coercion while the Establishment Clause violation need not be so attended."[200] Justice Brennan, concurring, noted that parents objecting to the secular nature of public education had the choice of sending their children to private sectarian schools.[201] Citing *Hamilton v. Regents of the University of California*,[202] where the Court upheld compulsory military training at state universities, Justice Brennan addressed the interplay between the religion clauses and pointed out that government power to regulate or prohibit conduct motivated by religious beliefs is different from government inability to compel behavior offensive to religious principles. The deciding factor in *Hamilton* was the fact that attendance at the state university was by choice. Justice Brennan stressed the ability of the government to regulate the "behavioral manifestations of religious beliefs, [but] it may not interfere at all with the beliefs themselves."[203] He also considered the role of the Court in cases involving public schools:

> It is not the business of this Court to gainsay the judgments of experts on matters of pedagogy. Such decisions must be left to the discretion of those administrators charged with the supervision of the nation's public schools. The limited province of the courts is to determine whether the means which the educators have chosen to achieve legitimate pedagogical ends infringe the constitutional freedoms of the First Amendment.[204]

This theme runs through many Supreme Court decisions, including some involving the religion clauses and others involving disciplining of students.[205] However, Fundamentalist Christians would have us believe that the courts are practically running the schools.[206]

The state of Arkansas enacted, but never enforced, a law prohibiting teaching from any textbook containing a discussion of the theory of evolution. In *Epperson v. Arkansas*,[207] a public school teacher challenged the validity of that law because she had violated it and feared prosecution. The Court struck down the law. While recognizing the control that states and localities have over education and the fact that teaching *about* religion is not prohibited in the public schools, Justice Fortas, writ-

200. School Dist. of Abington Township v. Schempp, 374 U.S. 206, 223 (1963). In *Mozert*, this distinction played a critical role in the Sixth Circuit Court's reversal of the remand decision.

201. *Id.* at 242. However, Justice Stewart, dissenting, cites Murdock v. Pennsylvania, 319 U.S. 105 (1943), for the proposition that the first amendment is available to all and not just those who can pay their way. *Abington*, 374 U.S. at 313.

202. 293 U.S. 245 (1934).

203. *Abington*, 374 U.S. at 254.

204. *Id.* at 279.

205. *See, e.g.*, Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) (discipline); Board of Educ. v. Pico, 457 U.S. 853 (1982) (right to hear); Wood v. Strickland, 420 U.S. 308 (1975) (discipline); Goss v. Lopez, 419 U.S. 565 (1975) (discipline); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (discipline); Epperson v. Arkansas, 393 U.S. 97 (1968) (establishment clause).

206. *See generally* T. Ascik, *Why Are We Going Backwards in Education?*, Speech at the Heritage Foundation (July 16, 1986); WOOD, *supra* note 134; LaHaye, *supra* note 1.

207. 393 U.S. 97 (1968). *Epperson* was recently upheld when the court struck down a Louisiana law requiring "equal time" for teaching of "creation science" along with biological theories of evolution. *See also* Edwards v. Aguillard, 482 U.S. 578 (1987).

ing for the court, stated: "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[208] This statement was used in the reversal of the Remand Decision. Allowing students to opt-out of the reading program adopted by the Hawkins County Public Schools would be tailoring the curriculum to the principles of the Fundamentalist Christians' religious beliefs.

Rhode Island and Pennsylvania passed statutes providing for direct supplementation of income to nonpublic school teachers and institutions. Subsequently, these statutes were attacked for violating the establishment clause. The case of *Lemon v. Kurtzman*[209] resolved this issue and crystallized the three part test used by the Court to determine whether a state has violated the establishment clause. Writing for the Court, Chief Justice Burger set out the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.' "[210] Chief Justice Burger further refined the entanglement prong of the *Lemon* test: "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the [s]tate provides, and the resulting relationship between the government and the religious authority."[211] The Court did not address the first two prongs of the test in this case because it found that both statutes created excessive entanglement between the states and religion due to the need for supervision and administration by the states of the funding programs which clearly were designed to aid secular institutions. Another concern of the Court was raised in dictum: the potential for political strife due to government entanglement with religion. Because religious beliefs are held so passionately, state involvement with religion or non-religion is likely to cause political turmoil. Other dictum within the Court's opinion recognized the impossibility of eliminating all interaction between state and church. The goal is to prevent the intrusion of either the

208. *Epperson*, 393 U.S. at 106.

209. 403 U.S. 602 (1971). The Lemon Test has been applied in cases involving financial assistance to religion or religious schooling in a number of cases. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (which held that New York financial aid programs to private schools, mostly sectarian, violated establishment clause by advancing religion); Meek v. Pittenger, 421 U.S. 349 (1975) (state financial aid to private schools inculcating religious values and belief violates establishment clause); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (provision of standardized testing to ensure compliance with state educational standards is secular purpose); Mueller v. Allen, 463 U.S. 388 (1983) (Minnesota law allowing deductions of certain expenses to all parents of schoolchildren whether enrolled in public or private schools not in violation of establishment clause because it serves secular purpose of educating the citizenry); Aguilar v. Felton, 473 U.S. 402 (1985) (New York City's use of federal funds to finance remedial instruction by public school teachers in private schools created excessive entanglement).

210. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted).

211. *Id.* at 615.

church or the state into the precincts of the other. The effort of the plaintiff parents in *Mozert* and of Fundamentalist Christians throughout the country is a clear attempt to have religion intrude into the governmental precinct of the public schools. Such intrusion is forbidden by the establishment clause and Supreme Court precedent. There is no secular purpose motivating Fundamentalist Christians, nor is the primary effect of their educational proposals secular. If the Religious Right is successful in imposing its will on the public schools, there will be an impermissible entanglement between the state and religion because each school board will be required to create a curriculum "tailored" to accommodate Fundamentalist Christian beliefs.

The role of tradition in the relationship between the state and religion was addressed in *Walz v. Tax Commission*.[212] In *Walz*, the argument was made that a grant of tax exemptions to places of worship would create an establishment of a state religion. "That claim could not stand up to more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present."[213] Tradition and historical practice have been used to overcome arguments that the establishment clause has been violated.[214]

The role of the public schools in instilling democratic values and developing students to their fullest potential has been recognized throughout their existence.[215] The separation of religion and the state is as old as the national government. Although the Religious Right would have us believe that the Supreme Court reversed a prevailing practice of prayer in the schools, only slightly more than thirty percent of the schools in the nation ever regularly conducted devotional exercises.[216] As demonstrated above,[217] the traditional practice in the public schools is not to teach religion. Fundamentalist Christians would breach this tradition in order to promote their religious beliefs. The fact that their conduct and attitude causes significant political strife throughout the country does not seem to faze the Fundamentalist Christians, even though the Court has consistently found that one purpose of the need for separation of church and state is to avoid such strife. Although there is little consensus regarding the Founding Fathers' reasons and intentions in drafting the religion clauses as they now stand,[218] there is general agreement among scholars that a major purpose was to avoid the turmoil the Founding Fathers had seen arising from entanglement of

212. 397 U.S. 664 (1970).

213. *Lemon*, 403 U.S. at 624.

214. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983). The Nebraska legislature's practice of beginning each session with a prayer in the "Judeo-Christian tradition" is permissible as a continuation of a practice "deeply embedded in the history and tradition of this country." *Id.* at 624; Harris v. McRae, 448 U.S. 297 (1980) (statute which "happens to coincide" with the tenets of some or all religions is not necessarily in violation of the establishment clause if it reflects "traditionalist values").

215. *See supra* notes 94-144 and accompanying text.

216. R. DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS (1962).

217. *See supra* notes 94-144 and accompanying text.

218. *See, e.g., Tension, supra* note 4; TRIBE, *supra* note 8.

religion and government.[219]

In *Wisconsin v. Yoder*,[220] Old Order Amish parents challenged Wisconsin's compulsory attendance statute which required children to attend public or private schools until the age of sixteen. The parents alleged the statute was a violation of their right to free exercise. Chief Justice Burger recognized the strong state interest in educating its children but found that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[221] One interest which is able to overcome that of the state's interest in universal compulsory education is the right to free exercise of religion. Dictum to the effect that parents have a strong interest in the religious education and upbringing of their children is drawn from the *Pierce* opinion[222] and was used by the Court in *Yoder* to illustrate that the state's interest in educating its children can be overcome. The holding in *Yoder* determined that where the state's interest in universal compulsory education conflicts with a parent's right to see to the religious upbringing of his children under the free exercise clause, the state's interest must yield. The Court found that the education of teenage children within the Old Order Amish society is equivalent to vocational training in the public schools and that the state's interest in educating Amish children was not strong enough to overcome the Amish parents' rights to raise their children according to their religious beliefs.

In *Mozert*, the plaintiff parents relied on *Yoder* as supporting their position. The Sixth Circuit distinguished the facts of *Yoder* from the facts involved in *Mozert* and consequently found that the plaintiff parents' reliance on *Yoder* was misplaced.[223]

In *Board of Education v. Rowley*,[224] parents of a deaf child sued, under the Education of the Handicapped Act (the Act),[225] to obtain the services of a universal sign language interpreter for their child in school. The school provided an "individualized educational program," including a special hearing aid and individual tutors, for the child, who was doing exceptionally well in school without an interpreter. The Court held that the legislative history of the Act indicated that the schools must provide a "meaningful" education to handicapped children and no more. The fact that the child in this case was doing exceptionally well was found to be an indication that she was receiving a meaningful education. The Court set out standards of review for determining whether programs meet the requirements of the Act: courts must not only be careful to limit their review to a determination of whether the require-

219. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203 (1948); Lemon v. Kurtzman, 403 U.S. 602 (1971).

220. 406 U.S. 205 (1972).

221. *Id.* at 215.

222. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

223. *See supra* notes 731-83 and accompanying text.

224. 458 U.S. 176 (1982).

225. 20 U.S.C. § 1400 (1982).

ments of the Act are met, but also allow the states to choose educational methods suitable for children in the program and not impose the court's own views in overturning "a State's choice of appropriate educational theories."[226]

The holding in *Rowley*, which is consistent with *Pierce* and other precedent, suggests that parents may have input in the education of their children but that *control* of education resides in the state and local governments providing it. Thus, the argument in *Mozert* that parents have been given *absolute* control over the education of their children by the Supreme Court is groundless. The Court has consistently held that local and state government has discretion to control curriculum in the public schools and that parents have the right and duty to see to the education of children beyond that provided in those schools.[227]

The Supreme Court also addressed the question of curriculum control in *Board of Education v. Pico*.[228] *Pico* involved the ability of a school board to remove books from public school libraries. The Court held that there is a "right to hear" founded in the first amendment:

> [J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed 'in light of the special characteristics of the school environment.'[229]

While school boards have discretion in determining a curriculum to meet the "duty to inculcate community values" in their students, this discretion is limited to the classroom and does not extend to school libraries where "the regime of voluntary inquiry . . . holds sway."[230] Because *Pico* is a plurality decision, it has little, if any, precedential value but it does confirm the discretion of local school boards to determine a curriculum for their schools without court interference so long as there is no violation of students' first amendment rights and freedoms.

The "right to hear" language in *Pico* is implicit in the Sixth Circuit holding in *Mozert* that mere exposure to ideas cannot violate the establishment clause. Since the public schools are especially important as marketplaces of ideas and some educators assert that the whole process of education is no more than exposure of students to as many ideas as

226. Board of Educ. v. Rowley, 458 U.S. 176, 207-08 (1982).

227. *See* Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 206 (1963); Board of Educ. v. Barnette, 319 U.S. 624 (1943). These cases provide a general discussion regarding the discretion of school boards, state and local governments' to prescribe the curriculum of the public schools without court intervention absent interference with fundamental rights. The *Pierce* case stands for the proposition that parents control children's education *beyond* that provided in the public schools. *See supra* notes 170-73 and accompanying text.

228. 457 U.S. 853 (1982).

229. *Id.* at 868.

230. *Id.* at 869.

possible, creation of a "right to hear" in the schools seems to be a reasonable solution to the dilemma presented by the challenge to public education posed by the Religious Right. The religious concepts espoused by Fundamentalist Christians could be presented as part of general discussions in programs addressing the social or historical significance of religion. In this way, but in no other, the religious views of any group could be introduced into the curriculum of a public school. Going further to accommodate *any* religious or non-religious viewpoint would be a clear violation of the establishment clause.

A recent example of the limits imposed upon the first amendment rights of schoolchildren is *Bethel School District v. Fraser*[231] in that a high school honor student challenged the discipline imposed on him for making a suggestive speech that caused a disruption at an assembly of students. The Court found that students' rights to free speech are limited by the need to maintain discipline in the school setting and stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[232] Recognizing that the primary purpose of free public education is the preparation of pupils for citizenship and "the inculcation of fundamental values necessary to the maintenance of a democratic political system,"[233] the Court went on to hold that:

> These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[234]

The Supreme Court in *Fraser* recognized limits to the first amendment right to free speech of school children.[235] It would be but a short step from this position to limit students' rights to free exercise of their religious beliefs in the schools. Such a limitation would avoid the often repeated problems in the public schools arising from the tension between the religion clauses. However, it is difficult to advocate limiting any fundamental right because starting down that path might place the individual rights revolution of the last forty years on the edge of the

231. 478 U.S. 675 (1986).

232. *Id.* at 682. The *Fraser* Court relied primarily on the authority of Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

233. *Id.* at 681.

234. *Id.*

235. *See also* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (which recognized the limitations upon school children's first amendment right to free speech).

steep and slippery slope to its demise. A more reasonable approach to present resolving the religious strife in the public schools would be to formalize the concept that there is a "right to hear" inherent in and complimentary to the first amendment right to freedom of speech, as held in *Pico* and implied in Judge Lively's opinion in *Mozert*.

CONCLUSIONS

Time and again the Supreme Court has found that the main function of public schools is the inculcation of society's values in preparation of students for adult life as citizens. The public school system has great discretion in determining the ways in which the schools go about accomplishing these goals but that discretion is limited by the constitutional rights of pupils, parents, and teachers. Although parents have important roles in determining their children's religious training, the Court has consistently found that the appropriate place for such training is not the public schools but in private schools, at home, and in church. Curriculum is controlled by state and local government through professional educators hired to determine the best means of educating our youth. Courts will step into the process of curriculum planning and implementation only where the fundamental rights of parents, students, or teachers are threatened. Fundamentalist Christians derogate the discretion of professional educators and the state to control the school system by inappropriately citing dicta from Supreme Court decisions. The Fundamentalist Christians' court challenges to curriculum decisions of professional educators, such as in *Mozert*, are an attempt to force the public schools into using teaching techniques and philosophies tacitly rejected by educators when they select other methods. This is ironic in view of the fact that Fundamentalist Christians rail about the manner in which the Supreme Court has forced the removal of religion from the public schools making them into a training ground for the "Godless religion of secular humanism." The challenge thrust upon the public schools by the Religious Right is inappropriate because there has been no infringement by the schools on Fundamentalist Christian students' constitutional rights in the various cases discussed above.

Among the values necessary for maintaining our pluralistic democratic society is tolerance toward views which differ from the norm. A corollary to this value is the need for all persons to accept the rule of the majority *so long as the fundamental rights of the minority are not violated.* In *Mozert*, the Fundamentalist Christian minority in attempted to impose its values upon the local public school system through the judicial system. The changes in public education sought by the plaintiff parents in *Mozert* are representative of those sought by the Fundamentalist Christian minority throughout the United States. Such changes would radically alter the function of the public schools in our society. The Fundamentalist Christian assault on the public school system is an attempt to impose the will of a minority upon the majority in a situation where there has been no violation of the minority's constitutional rights. The principles of

democratic government will not permit this imposition; Fundamentalist Christians must acknowledge and accept the fact that they live in a society with great diversity in religious beliefs.

The primary goal of the Fundamentalist Christian challenge to public education is either to "put religion back into the schools" or to destroy the system and replace it with a system run by Christians. Consideration of the history of American public education demonstrates that "religion," as conceived by Fundamentalist Christians, was never a part of the public school curriculum. Supreme Court precedent establishes that accommodating any religious group's demand to include its viewpoint in the public school curriculum would be a violation of the establishment clause. Restricting the range of ideas available to students implicates first amendment rights of free speech. Furthermore, the pressures put on the public school systems by the Religious Right actually give rise to a chilling effect which causes teachers to censor the material they present in class, even though such material complies with local and constitutional guidelines. Fundamentalist Christian high pressure tactics cannot and will not be tolerated either by the courts or the majority of the population if the end result is to inhibit the free speech rights of others. These attacks also cause significant social and political strife. One of the few areas of agreement regarding the rationale behind the religion clauses is the belief that they intended to prevent the strife from government involvement with religion.

Given the traditional role of the public schools in creating good citizens, the Fundamentalist Christian goal of replacing them with Christian schools is also improper. Part of the education of a good citizen is the development of democratic values, including tolerance for the sensibilities and viewpoints of others. Refusal to accept the beliefs of others on religious grounds can be accepted in society so long as it does not infringe on the rights of people to believe as they choose. Religious intolerance cannot be accepted in the public schools anymore than racial intolerance because of its philosophical conflict with democratic values.

The Religious Right demands elimination of certain curriculum content and teaching techniques because of alleged violation of Fundamentalist Christian beliefs. The teaching techniques challenged by the Fundamentalist Christians have been demonstrated by both research and application to be the most effective ways to teach students the skills and material necessary for their success in today's increasingly complex society. Since the second major goal of education is the development of individuals to their fullest capacity, accommodation of Fundamentalist Christian demands for use of less effective teaching methods would be improper.

The demands for change in public education made by the Fundamentalist Christian minority are inappropriate in light of the United States Constitution, Supreme Court precedent, the traditional role of public schoools in society and the need for effective education. The Religious Right derogates the judicial system for having removed reli-

gion from the schools but at the same time it attempts to use the judiciary to further its own views. The courts have consistently found that the demands of the Fundamentalist Christian minority cannot be accommodated in the schools without violating first amendment rights of others. Although Fundamentalist Christians are correctly concerned about the failure of public schools to recognize the role of religion in the history and society of our nation and the world, their general demands cannot be met without violating the establishment clause. In fact, there is good reason to believe that this lack of objective presentation of religious views in the schools arises primarily due to the activities of the Fundamentalist Christians. It is a well-accepted equitable principle that one cannot plead his own wrong as grounds for relief. If the Religious Right want their children taught from a "Christian perspective," they will have to utilize alternatives such as home schooling or private education to do so because their demands cannot be met in the public schools without violating constitutional law.

Joseph C. Cohen, Jr.